Local Union No. 38, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Mechanical Contractors Association of Northern California) ***and*** **Ed Bermingham**

Local Union No. 38, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Bechtel Corporation) ***and*** **Philip H. Livingston.** Cases 20–CB–7279, 20–CB–7550, 20–CB–7691, 20–CB–8025, 20–CB–7346, and 20–CB–7659

February 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On January 31, 1990, Administrative Law Judge Burton Litvack issued the attached decision. Charging Party Philip H. Livingston filed exceptions and a supporting brief; the Respondent Union filed cross-exceptions and a brief in opposition to Charging Party Livingston's exceptions; and the General Counsel filed partial cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found, inter alia, that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing to notify job applicants adequately prior to implementing certain modifications of its contractually established hiring hall rules.[2] The judge further found that because the Respondent did not adequately notify hiring hall users of these modifications, the Respondent's implementation of these modifications ''so as to adversely affect users of the hiring hall'' was also violative of Section 8(b)(1)(A) and (2) of the Act.[3] He concluded that to the extent any of these modifications resulted in lost job opportunities for applicants who would otherwise have been entitled to receive the referrals according to posted hiring hall procedures, the applicants were entitled to be made whole.

Both the Respondent and the General Counsel have cross-excepted to certain aspects of the judge's decision regarding these and related modifications and we find merit in certain of their cross-exceptions.

Initially, although we agree with the judge that the failure to give notice of the above modifications violated the Act, we find that the Respondent thereby violated Section 8(b)(1)(A) but did not further violate Section 8(b)(2) as the judge also found. In this regard, we note that although findings of violations of Section 8(b)(1)(A) and (2) do not necessarily go hand in hand, in certain cases, union conduct found to interfere with employee rights in violation of Section 8(b)(1)(A) has the further effect of violating Section 8(b)(2) by causing employers to refuse employment for discriminatory reasons. Thus, in *Electrical Workers IBEW Local 675 (S & M Electric)*, 223 NLRB 1499 (1976), the respondent union was found to have violated both Section 8(b)(1)(A) and (2) by its discriminatory refusal to refer an employee for employment under the terms of its exclusive referral system. The Board found (at 1499) that,

> Such union conduct, by its very nature indirectly induces the Employer to refuse employment to that employee in violation of Section 8(a)(3). Hence, we find that by discriminatorily refusing

[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that at sec. III, fn. 34, of the judge's decision, the first sentence should refer to ''1987'' not ''1967.'' At sec. III, fn. 39, the second sentence should refer to ''1987.'' Also at sec. III, par. 41, the ninth sentence should in relevant part state, ''the latter is credited as to not becoming aware of the nature of the hiring hall rule changes until 1988.'' At sec. III, par. 42, the third sentence should in relevant part state, ''Thus, while the key men provision prohibited the dispatching of SG-2 members as long as SG-1 members. . . . .'' At sec. III, par. 49, the third sentence should in relevant part state, ''in accord with my belief that business agent Fred Castro appeared to be an utterly disingenuous witness, one who would not be credited at all herein . . . .'' Finally, at sec. III, fn. 42 should, in relevant part, state ''there must be no SG-1 member, who has key man experience . . . .''

[2] These modifications were agreed to by the Respondent and the signatory multiemployer associations on September 11, 1986. These include the suspension of the hours-of-work requirements for seniority groups 1 and 2, the suspension of the 120-working-days requirement in the provision permitting signatory contractors to make written requests for particular individuals who have worked at least 120 days for them during the preceding 12 months and who were laid off within 30 days of the request (the ''men terminated within 30 days'' provision), and the increase from 5 to 10 in the number of days an employee would have to work before losing his position on the out-of-work list.

We reverse the judge's finding regarding the failure to give notice of the last modification because the General Counsel did not allege that the failure to give notice of this modification was unlawful. In addition, because the judge's finding that Bermingham dispatch 94 was unlawful was based on his finding that the failure to give notice of this modification was unlawful, we also find that dispatch 94 has not been shown to constitute a violation.

[3] For the reason set out in fn. 2 above, we do not find that implementing the increase in the number of days an employee would have to work before losing his position on the out-of-work list from 5 to 10 violated the Act.

> to refer [employee] Owchariw for employment, the Respondent Union violated Section 8(b)(2).

In concluding that the Respondent had violated Section 8(b)(1)(A) and (2) in this case, the judge relied heavily on the Board's decision in *Plumbers Local 230*, 293 NLRB 315 (1989), but we find that case to be inapposite. There, the respondent union was found to have violated Section 8(b)(1)(A) and (2) by failing to adequately notify hiring hall applicants of a lawful change in its hiring hall rules. The failure to notify hiring hall applicants resulted in the failure to dispatch an employee who was in noncompliance with the change. Specifically, the new rule imposed a requirement that employees write the word ''anything'' next to their names on the out-of-work list. Employees who failed to do so were restricted to only certain kinds of jobs. Employee Conley, whose name was first on the out-of-work list but who was not informed of the new rule and who therefore did not write the word ''anything'' next to his name, was not referred to a particular job for this reason. The Board found that the union's failure to make a good-faith effort to give timely notice of the rule change in a manner reasonably calculated to reach all those who used the exclusive hiring hall, which in turn resulted in the failure to dispatch Conley for noncompliance with the change, violated Section 8(b)(1)(A) and (2) of the Act.

In the instant case, it is true that the Respondent's failure to provide timely notice of the lawful modifications in the hours-of-work requirement and the ''men-terminated-within-30 days'' rule, to which all parties had agreed, was arbitrary and in breach of its duty to represent job applicants fairly by keeping them informed about matters critical to their employment status. The Respondent Union thereby violated Section 8(b)(1)(A).[4] In the instant case, however, unlike in *Plumbers Local 230*, the modifications did not impose any affirmative obligations on hiring hall users who would have acted differently had they been informed of the modifications. Thus, as explained further below, the failure to provide timely notice to employees of these modifications did not cause employers to refuse employment to any employees. Therefore, in the instant case, we find only an 8(b)(1)(A) violation for the failure to give adequate notice of the modifications.

As noted, because the judge here found that the failure to give notice violated Section 8(b)(1)(A) and (2), he found that ''it logically follows'' that the implementation of these contractual hiring hall rules modifications likewise violated Section 8(b)(1)(A) and (2). We have reversed the 8(b)(2) violation for the failure to give notice of these rules modifications. We also reverse the judge's findings of violations in the Respondent's implementation of these rules modifications. In doing so, we note that there was no discriminatory motive shown for the modifications and the Union has demonstrated that the modifications were necessary to the effective performance of its representative function.[5] Indeed, the judge here noted that ''counsel for the General Counsel questions neither the validity of nor the necessity for the above-described modifications.'' In finding the implementation of the modifications to be a violation, the judge cited to *Plumbers Local 230*, supra. As noted, the union there made a lawful change in its hiring hall rules, failed to give adequate notice of the change, and the Board found both 8(b)(1)(A) and (2) violations for the failure to dispatch an employee who did not comply with the change. There, however, the employee could have acted differently had he been aware of the change and obtained the job. In contrast, here, even if the Respondent's notice to hiring hall users had been satisfactory, the employees involved, unlike the employee in *Plumbers Local 230*, would still have been unable to do anything to change the effect of the modifications on their status. The employees' placement on the appropriate list was simply a matter of the application of the new, lawful eligibility criteria and would not have been affected by anything the employee did or did not do upon being informed of the change. Similarly, the suspension of the 120-working-days requirement in the ''men-terminated-within-30-days'' provision involved action by the signatory contractor, not by the requested individual. Accordingly, there was no violation of the Act regarding the implementation of the modifications in the seniority group hours-of-work requirement and the working-days requirement of the ''men-terminated-within-30-days'' rule. We shall therefore enter only a cease-and-desist order to remedy the Union's failure to give adequate notice of these modifications.

2. The General Counsel excepts to the judge's failure to conclude that the Respondent's practice in 1987 and 1988 of merging all five seniority groups violated Section 8(b)(1)(A) and (2) of the Act for reasons other than the failure to provide notice to the hiring hall users. In this regard, the General Counsel contends that the evidence that the Respondent created a single out-of-work list without regard to any of the contractual seniority groups establishes a clear violation of the hiring hall rules. We disagree. Instead, we find that the creation of a single out-of-work list was a logical consequence of the mutually agreed change in the hours-of-work requirement. Because, as noted above, the General Counsel has not contested the legitimacy or necessity of that change, its effective implementation through creation of the single list was not unlawful.

[4] See *Operating Engineers Local 406 (Ford Construction)*, 262 NLRB 50, 51 (1982).

[5] See the standard set out in *Operating Engineers Local 406 (Ford Construction)*, supra, fn. 5 at 51.

Until 1986, the Union used a five-tiered seniority system to refer individuals for work. To be in seniority group 1, an individual had to have worked a specified number of hours for a set period of time. Seniority group 2 required fewer hours, and so on. The hiring hall rules required referring all individuals on the out-of-work list who were in seniority group 1 before referring anyone from seniority group 2, and so on.

In 1986, because of a significant decrease in total available hours and a decline in the number of long-term projects, the Union realized that under the then-current hiring hall rules, referrals would go to a relatively few individuals who managed to retain group 1 status. The Union sought to change the referral rules, and the multiemployer association using the exclusive hiring hall agreed. Pursuant to the agreement, the Union suspended the hours-of-work requirement for seniority groups 1 and 2, thereby including in those groups any individual who had worked under the master labor agreement at any time before signing the out-of-work list. Because all individuals in seniority groups 1, 2, and 3[6] referred during the relevant time period had worked under the master labor agreement at some time before signing the out-of-work list, the effect of the rule change was to combine the separate groups into one group.

Our dissenting colleague argues that because the agreement to change the hiring hall rules does not specifically refer to seniority groups 3, 4, and 5, therefore the agreement cannot apply to them. This reasoning, however, would require the Union to continue assigning available hours to a limited number of hiring hall users, despite the fact that the agreement lawfully changed the hiring hall rules in order to distribute the available hours more equitably. Further, our dissenting colleague's reading of the agreement freezes preagreement group 3 individuals into that group. This, however, ignores the reality that under the old rules, individuals were not assigned to a group in perpetuity, i.e., an individual in group 3 might later qualify for group 1 or group 2. Once the hours-of-work requirement for defining seniority groups 1 and 2 was changed, nothing prevented former seniority group 3 hiring hall registrants from qualifying for inclusion in seniority groups 1, so long as they had worked under the master labor agreement at any time. In effect, the contractual modifications logically reached beyond just redefining the priorities among groups 1 and 2 registrants and were properly reflected in a single out-of-work list. Accordingly, there was no violation of the Act in the merger of all the seniority groups.

3. The judge also found that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by departing from its hiring hall rules insofar as it failed to accord priority to seniority group 1 registrants in the application of hiring hall rules pertaining to keymen, men terminated within the preceding 30 days, right to hire by name, and bumping.[7] The judge noted the Respondent's explanation for its failure to abide by the keymen, men terminated within 30 days, and right-to-hire-by-name rules, i.e., that the suspension of the hours-of-work requirements and the resultant seniority group merger made strict adherence to these rules unnecessary. Nonetheless, the judge found that because the implementation of the suspension of the hours-of-work requirement was rendered unlawful by the lack of adequate notice and because the Respondent had not demonstrated a compelling necessity for its failure to comply with the seniority requirements in these rules, the departure from the hiring hall rules constituted arbitrary and inherently discriminatory conduct in violation of Section 8(b)(1)(A) and (2). We have already found that the Respondent did not violate the Act in its implementation of the changes agreed to between the Union and the signatory multiemployer associations and have also found that the Respondent's merger of all five seniority groups did not violate the Act. Contrary to the judge, for the same reason explained above regarding the linkage between the modification in the seniority group hours-of-work requirement and the creation of a single out-of-work list, we find no violation in the Respondent's departure from hiring hall procedures in permitting the dispatching of members who were lower than seniority group 1 to keymen positions when those who were higher may have been available, and in dispatching those lower than seniority group 1 pursuant to the ''men-terminated-within-30-days'' and hiring-by-name provisions. These departures from the published rules were simply a logical result of the lawful suspension of hours-of-work requirements that effectively merged the seniority groups.[8]

Finally, we agree with the judge's interpretation of the 30-day language in the ''men-terminated-within-30-days'' and the by-name provisions. The Respondent's departure from those rules as properly construed did not—unlike the changes discussed above—flow

[6] There was no one in seniority groups 4 and 5 during the relevant time.

[7] The keymen rule prohibits dispatching a member of any group lower than seniority group 1 as long as seniority group 1 members with the requisite foreman experience are available on the out-of-work list. The terminated-within-30-days and the right-to-hire-by-name rules restrict such requests, to members of seniority group 1. The bumping rule requires that the Respondent post a list of persons who are in seniority groups lower than seniority group 1 so that job applicants in seniority group 1 who are currently unemployed can exercise their right to remove an employee in a lower group from a jobsite.

[8] Therefore, the only violations we find regarding Charging Party Ed Bermingham since May 28, 1987, are those involving the Respondent's failure and refusal to dispatch him to jobs for which he was eligible and available because he had filed unfair labor practice charges with the Board and engaged in other protected concerted activities.

from mutually agreed contract modifications, was not otherwise shown to be necessary to the operation of the hiring hall, and actually affected the hiring hall applicants' opportunities for work. We, therefore, also agree with the judge that the Respondent's departure from these rules violated Section 8(b)(1)(A) and (2) of the Act. We similarly agree with the judge's findings on the referral of named and unnamed individuals at the same time, and his finding on the bumping provision as set out at section III,B,1,B of his decision.

AMENDED CONCLUSIONS OF LAW

The following shall be substituted for the judge's conclusions of law.

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. By failing to notify job applicants adequately of the modifications of its contractually established hiring hall rules (including the suspension of the hours-of-work requirements and the suspension of the 120-working-days requirement in the provision permitting signatory contractors to make written requests for individuals who have been laid off within 30 days prior to such request) that were agreed on by the Respondent and the signatory contractors on or about September 11, 1986, the Respondent operated its exclusive hiring hall in an arbitrary and discriminatory manner, violative of Section 8(b)(1)(A).

3. By failing to adhere to article II, sections 16(b) and (e) and 25, of the parties' contract, the Respondent operated its exclusive hiring hall in an arbitrary and discriminatory manner in violation of Section 8(b)(1)(A) and (2) of the Act.

4. By, since May 28, 1987, failing and refusing to dispatch Ed Bermingham to jobs for which he was eligible and available because he filed unfair labor practice charges with the Board and engaged in other protected concerted activities, the Respondent operated its hiring hall in an arbitrary manner and discriminated against Bermingham in violation of Section 8(b)(1)(A) and (2) of the Act.

5. By failing and refusing to honor Bermingham's request for dispatch information in order that he could protect his referral rights, the Respondent engaged in conduct violative of Section 8(b)(1)(A) of the Act.

6. By removing Bermingham's name from the June 1989 out-of-work list, the Respondent engaged in arbitrary and discriminatory conduct, violative of Section 8(b)(1)(A) and (2) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Unless noted above, the Respondent engaged in no other unfair labor practices.

AMENDED REMEDY

Having found that the Respondent has engaged in and is continuing to engage in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, we shall order it to cease and desist and to take certain affirmative actions which are necessary to effectuate the policies of the Act.

With regard to Charging Party Ed Bermingham, we have found that the Respondent unlawfully failed and refused to dispatch him to available jobs after May 28, 1987, based on unfair labor practice charges which he had filed with the Board and other protected concerted activities. To remedy this unlawful conduct, Bermingham shall be made whole for any loss of earnings and benefits suffered. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[9] Likewise, as we have concluded that the Respondent deliberately and discriminatorily omitted Bermingham's name from its San Rafael June 1989 out-of-work list, the Respondent shall be ordered to make Bermingham whole for any wages and benefits he may have lost as a result of the discrimination against him in the manner set forth above. Finally, the Respondent shall be ordered to post a notice.

ORDER

The National Labor Relations Board orders that the Respondent, Local Union No. 38, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO, San Francisco, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to notify job applicants adequately of changes in the hiring hall rules.

(b) Operating its hiring hall in an arbitrary and discriminatory manner.

(c) Refusing to dispatch applicants and removing their names from its out-of-work list because they filed unfair labor practice charges with the Board or engaged in other protected concerted activities.

(d) Failing and refusing to provide dispatch information to job applicants that is necessary in order to protect the applicants' referral rights.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[9] Interest will be computed at the ''short-term Federal rate'' for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.

(a) Make Ed Bermingham whole for any loss of earnings and benefits which he may have suffered since May 28, 1987, because of the Respondent's discrimination against him because he filed unfair labor practice charges with the Board and engaged in other protected concerted activities and because the Respondent arbitrarily and discriminatorily removed his name from its June 1989 San Rafael out-of-work list. Backpay, with interest, shall be computed in the manner set forth in the above amended remedy section.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all hiring hall records, dispatcher lists, job orders, referral calls, and other documents necessary to analyze and compute the amount of backpay due Bermingham under the terms of this Order.

(c) Post at its facilities in San Francisco, San Rafael, and Santa Rosa, California, copies of the attached notice marked ''Appendix I.''[10] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint in Cases 20–CB–7346 and 20–CB–7659 be dismissed in its entirety.

MEMBER DEVANEY, concurring in part and dissenting in part.

I agree with my colleagues' finding that the Respondent Union violated Section 8(b)(1)(A) by failing to give notice of a change in hiring hall rules, but did not violate Section 8(b)(2) by failing to provide notice. I also agree that the Union did not violate the Act by implementing the rule changes.[1] I do not agree, however, with my colleagues' finding that the Respondent did not violate the Act in 1987 and 1988 when, notwithstanding that the modifications agreed to by the Respondent and the multiemployer association provided for the merger only of seniority groups 1 and 2, it began departing from its hiring hall rules by merging all five seniority groups.[2]

As the General Counsel contends, the evidence that the Respondent created a single out-of-work list without regard to any of the contractual seniority groupings establishes a clear violation of Section 8(b)(1)(A) and (2). In this regard, in *Operating Engineers Local 406 (Ford Construction)*, 262 NLRB 50, 51 (1982), the Board held that:

> [A]ny departure from established hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates Section 8(b)(1)(A) and (2), unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function [footnote omitted].

In the instant case, the Respondent has not shown that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function.

The Respondent's rationale for the merger of seniority groups 1 and 2 was that there was a decline in employment opportunities within the Respondent's jurisdiction so that the number of individuals able to qualify for seniority group 1 had declined. This rationale, however, does not explain why the Respondent found it necessary to merge the other seniority groups.[3] Thus, the Respondent has made no showing that the effective elimination of all priority based on the contractual seniority criteria was necessary for the effective performance of its representative function or was pursuant to a valid union-security clause. Moreover, any changes in the priority system going beyond the merger of seniority groups 1 and 2 were not authorized by any

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] I also agree with the finding that the Respondent violated the Act by refusing to dispatch Charging Party Bermingham because of protected concerted activity, by removing his name from the out-of-work list, and by refusing to supply him with requested information, and with the dismissal of Charging Party's Livingston's allegations.

[2] In this regard, the Respondent, subsequent to January 1, 1987, began dispatching, without regard to any seniority groupings, applicants who were qualified only for seniority group 3 or lower before seniority group 1 or 2 members if the former names were higher on the out-of-work list.

[3] The Respondent further contends that the suspension of the hours-of-work requirement had the dual effect of making eligibility for seniority groups 1 and 2 the same and making eligible for inclusion on the new seniority group 1 list any individual who had worked under the multiemployer association labor agreement at some time prior to registering on the out-of-work list. Inasmuch as every individual referred from the hall during the relevant period had worked under the multiemployer association labor agreement at some point prior to registering on the out-of-work list, the Respondent argues that all the individuals became eligible for inclusion on the seniority group 1 list. I reject the Respondent's claim that a necessary outcome of effectively abolishing seniority vis-a-vis seniority groups 1 and 2 was to abolish seniority vis-a-vis all groups. The latter situation is not a necessary outcome of the former situation.

agreement with the employer parties to the contract. I therefore would find that the Respondent's departure from the contractual hiring hall rules by its effective elimination of all priority based on the seniority groups violated Section 8(b)(1)(A) and (2).

In light of the Respondent's unlawful merger of all five seniority groups, I would also find that the Respondent's departure from its hiring hall rules in permitting the dispatch of members who were lower than seniority group 2 to keymen positions when those who were higher may have been available and in dispatching those lower than seniority group 2 pursuant to the men-terminated-within-30-days and right-to-hire-by-name provisions[4] violated the Act. I would find that any applicants affected by the Respondent's discriminatory conduct as well as by its failure to adhere to the keymen, men-terminated-within-30-days, the right-to-hire-by-name, and the bumping provisions should be made whole for any loss of earnings and benefits they have suffered.

[4] As noted by my colleagues, the keymen provision prohibits the dispatching of a member of any group lower than seniority group 1 as long as seniority group 1 members with the requisite experience are available on the out-of-work list. The men-terminated-within 30-days and the right-to-hire-by-name rules restrict requests, pursuant to their terms, to members of seniority group 1.

APPENDIX I

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to notify job applicants adequately of modifications of the hiring hall rules.

WE WILL NOT operate our exclusive hiring hall in an arbitrary or discriminatory manner.

WE WILL NOT refuse to dispatch applicants or remove their names from any of our out-of-work lists because they filed unfair labor practice charges with the National Labor Relations Board or engaged in other protected concerted activities.

WE WILL NOT fail and refuse to provide information to job applicants that is necessary for them to protect their referral rights.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Ed Bermingham whole, with interest, for any loss of earnings and other benefits which he may have suffered as a result of our removal of his name from our June 1989 out-of-work list at our San Rafael office.

LOCAL UNION NO. 38, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO

Jonathan Seaqle, Esq., for the General Counsel.
Albert Brundage, Esq., of San Francisco, California, for the Respondent.
Ed Bermingham, appearing pro se.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on unfair labor practice charges in Cases 20–CB–7259 (filed by Ed Bermingham, an individual, on May 26, 1987), 20–CB–7346 (filed by Philip H. Livingston, an individual, on July 28, 1987, and amended on August 19, 1987), 20–CB–7550 (filed by Bermingham on February 25, 1988, and amended on April 29, 1988), 20–CB–7659 (filed by Livingston on June 24, 1988), and 20–CB–7691 (filed by Bermingham on July 29, 1988), the Regional Director of Region 20 of the National Labor Relations Board (the Board) issued an amended consolidated complaint (the consolidated complaint) on February 10, 1989, alleging that Local Union No. 38, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Respondent) had engaged in various acts and conduct violative of Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of any of the alleged unfair labor practices and asserting certain affirmative defenses, including the 10(b) statute of limitations. Thereafter, the above-captioned matters were scheduled for hearing and tried before me in San Francisco, California, on February 27 and March 1–3, 7, and 8, 1989. Based on an unfair labor practice charge in Case 20–CB–8025, filed by Bermingham on June 30, 1989, the Regional Director of Region 20 issued a complaint on August 31, 1989, also alleging violations of Sections 8(b)(1)(A) and 8(b)(2) of the Act. Given identical issues as involved in the above cases, Case 20–CB–8025 was consolidated, the above-captioned cases were reopened, and an additional day of hearing was held on October 19, 1989. At the hearings, all parties were given the opportunity to examine and cross-examine witnesses, to present any and all relevant documentary and other evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully scrutinized and considered. Accordingly, based on the entire record, including my observation of the testimonial demeanor of each of the witnesses and the posthearing briefs, I make the following

FINDINGS OF FACT[1]

I. LABOR ORGANIZATION

Respondent admits that it is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. ISSUES

With regard to Cases 20–CB–7346 and 20–CB–7659, the unfair labor practice charges filed by Livingston, it is alleged that Respondent twice engaged in conduct violative of Section 8(b)(1)(A) of the Act—on one occasion by threatening Livingston with bodily harm if he came to or attempted to utilize Respondent's hiring hall and on the other by threatening him with unspecified reprisals for having filed unfair labor practice charges with the Board. Respondent denied the allegations, admitting the conversations but placing what was said in a different context. As to the unfair labor practice allegations concerning Bermingham Cases 20–CB–7259, 20–CB–7550, 20–CB–7691 and 20–CB–8025, it is asserted in the complaints that Respondent violated Section 8(b)(1)(A) and of the Act by operating its exclusive hiring hall in a manner inconsistent with its existing collective-bargaining agreement's hiring hall rules and regulations and by discriminatorily refusing to refer Bermingham and removing his name from the out-of-work list because he filed unfair labor practice charges with the Board and contractual grievances with Respondent and that Respondent violated Section 8(b)(1)(A) of the Act by refusing Bermingham's request for information regarding its out-of-work list, referral requests, and dispatch records. Respondent denied the commission of any unfair labor practices, arguing that its dispatch procedures reflect agreements with its contracting employers and are necessary to represent all its member employees, that there is no evidence of discrimination against Bermingham and that to produce the records requested by him would be unduly burdensome and oppressive.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Cases 20–CB–7346 and 20–CB–7659*

1. The facts

The record establishes that Philip H. Livingston has been a pipefitter and a member of Respondent since 1982; that he last worked in March 1986; that he was not registered on any of Respondent's out-of-work lists since that time; and that, while he visited Respondent's hiring halls[2] during 1987 and 1988, such were merely ''to see what's going on.'' The record further establishes that Livingston has been, for several years, an active critic of Respondent's operating policies and practices, having filed NLRB and internal union charges involving the conduct of its officers, including Joseph Mazzola, Respondent's long-time business manager. One such NLRB charge, filed prior to the events herein, resulted in a settlement agreement pursuant to which Respondent paid approximately $16,000 to Livingston. The record also establishes that Mazzola has termed Livingston's above conduct ''malicious'' and meant to ''destroy'' Respondent. The instant unfair labor practice allegations concern two conversations between Livingston and Mazzola.

The initial conversation, according to Livingston, occurred at approximately 3:30 p.m. on June 22, 1987. He called Mazzola at the latter's San Francisco office, introduced himself, and, although they last spoke 6 to 8 months before, recognized Mazzola's voice. Livingston testified that he telephoned the former in order to ''delve'' into aspects of Respondent's operations, including the construction cost of Respondent's new Santa Rosa meeting hall which had been completed in 1983 and that he began on that subject, asking for the amount spent on constructing the building. Mazzola replied by saying ''something that I didn't understand and ended up with the words 'son of a bitch.' And I said, 'What did you say?' And he . . . repeated it and ended up with the words 'son of a bitch.''' Livingston asked if Mazzola was, in fact, calling him a ''son of a bitch,'' and Mazzola replied that the former had ''caught him in the right mood'' and added, ''You come down to the Hall and I'll beat the shit out of you.'' Livingston responded that he just wanted to know how much the Santa Rosa building had cost to construct, ''and then [Mazzola] repeated himself, [saying] ''You come down to the Hall and I'll beat the shit out of you in front of the whole membership.'' During cross-examination, Livingston recalled that the conversation ended with Mazzola asking if Livingston had tape recorded the conversation.

Mazzola testified to a different version of this conversation, stating that he was not only aware of who Livingston was but recalled the previous unfair labor practice settlement agreement. According to Mazzola, Livingston had, once before, telephoned him, complaining about two business agents deliberately keeping him from working. After calming Livingston down, on that occasion, Mazzola arranged to meet the former in Santa Rosa in order to discuss his problems. Thereafter, a meeting was held at Respondent's office in that city, with Livingston raising complaints about two business agents, Fred Castro and Raymond Springer, who assertedly were refusing to dispatch him to work. During the meeting, Mazzola continued, Livingston continually threatened to take Respondent both to the NLRB and to court and repeated comments made during the telephone conversation that he was from Chicago and knew all about Mazzola. After this meeting, Mazzola further testified, he did not speak to Livingston for over a year, during which the latter ''commenced to get involved with the NLRB,'' until the instant telephone conversation. According to Mazzola, Livingston ''started off . . . that these two sons of bitches were at it again . . . screwing up with his livelihood and they were keeping him out of work.'' He then threatened to get them and take away their houses; Mazzola interrupted, asking why Livingston thought it necessary to threaten the business agents. To this, Livingston replied, ''I'm one son-of-a-bitch that don't have any fear for you. . . . I can handle a guy like you.'' Mazzola admittedly became excited at that point and retorted, ''look there's a union meeting . . . this Wednesday night. . . . Why don't you come on down and I'll ask the membership to open up a ring, and I guarantee I'll kick the shit out of you.'' No more was said, and Mazzola specifi-

[1] The jurisdiction of the National Labor Relations Board is not at issue, has been admitted by Respondent, and shall not be elaborated on by me.

[2] Respondent operates contractually established hiring halls in San Francisco, San Rafael, and Santa Rosa, California.

cally denied any discussion regarding the cost of the Santa Rosa building.

The second confrontation between the two men occurred on March 14, 1988, in the parking lot outside of Respondent's San Francisco facility. Livingston testified that he arranged to meet Ed Bermingham there and that, as they walked toward Livingston's car, Mazzola, who was also in the parking lot and speaking to another member, noticed him and said, ''There's Livingston.'' The latter walked over to Mazzola, extending his hand, and asked how the business manager was doing. Mazzola suddenly said, ''So you're investigating me,'' and, after Livingston failed to reply, said ''What's this shit I hear that you're a Christian? . . . You're no fucking Christian.'' Again, Livingston made no response, and Mazzola continued, saying, ''You son of a bitch, you must be a thief . . . because only a thief would . . . the government has been investigating me for ten years and haven't [sic] found anything.'' He added that Respondent's executive board told him ''that if I want to know anything to ask them'' and that he was thinking about investigating Livingston. Thereupon, according to Livingston, Mazzola called him a ''bastard,'' adding ''Let's see how you come out.'' Believing that Mazzola was on the verge of becoming extremely upset, Livingston abruptly turned and walked away. During cross-examination, Livingston characterized Mazzola as being ''very excited'' and ''talking very loud.'' Further, while saying that Mazzola did mention Livingston ''investigating him,'' Livingston admitted that the former made no reference to the NLRB. Finally, the Charging Party averred that there were no threats uttered during this conversation; it was Mazzola's ''demeanor'' that concerned him.

With regard to their confrontation on that day in March 1988, Mazzola testified that it occurred ''when I was going into the parking lot to get into my car and I run into Brother Livingston and Brother Bermingham.'' Mazzola admits calling Livingston a ''phony bastard,'' saying he had learned that Livingston had asked his secretary for electrical billings for work done at his (Mazzola's) family ranch and Livingston would not be given any such records. Mazzola further admitted that he may have cursed Livingston again, saying he'd been investigated by the Government for many years and had nothing to worry about. He added that if Livingston was from Chicago and used such tactics, he should be the one being investigated. Mazzola further admitted being ''so damn mad'' about what Livingston had been doing that he could not recall exactly what he said to the former on that occasion. However, he did deny making any threats of reprisals for Livingston going to the NLRB; ''I begged him not to. To use the union and the executive board for us to try to iron it out.''

2. Analysis

Essential to a determination as to whether the foregoing confrontations constitute violations of Section 8(b)(1)(A) of the Act, as alleged in the instant complaint, is a resolution of the credibility of the two witnesses. In this regard, while neither was a particularly unimpressive witness, Joseph Mazzola seemed to be the more candid and straightforward regarding the above-described conversations and, in light of what I perceived as his truthful demeanor, shall be credited over Philip Livingston. Accordingly, I find that, during their June 1987 telephone conversation, Mazzola invited Livingston to attend a membership meeting and engage in a fist fight with him after Livingston complained about the actions of Business Agents Castro and Springer and uttered personal threats against them and warned that he (Livingston) had no fear of Mazzola and could ''handle'' him. The test for determining if Mazzola's remark constituted a violation of Section 8(b)(1)(A) of the Act is whether the remark tended to restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.'' *Laborers Local 806*, 295 NLRB 941 (1989); *Laborers Local 496 (Newport News)*, 258 NLRB 1105 fn. 2 (1981). In reaching said determination, the Board must initially decide whether the disputed conduct is the result of personal animosity or an emotional reaction to some sort of provocation or is directly related to Section 7 conduct. *Laborers Local 806*, supra; *Teamsters Local 729 (Penntruck Co.)*, 189 NLRB 696 (1971). While the remark was uttered after Livingston had registered a complaint about the two business agents, it seems clear that Mazzola was reacting to Livingston's threats against Castro and Springer and the latter's warning that he could ''handle'' Mazzola. In these circumstances, as I believe that the latter was merely emotionally reacting to a perceived provocation and not to Livingston's protected concerted activities, I do not believe his remark was violative of Section 8(b)(1)(A) of the Act.

With regard to the confrontation in the parking lot of Respondent's San Francisco facility in March 1988, there is really no dispute that Mazzola spoke in an excited and loud manner and undoubtedly cursed at Livingston, calling him a ''bastard, a son-of-a-bitch, and a thief.'' However, based on my credibility resolution, I find that said remarks were demonstrative of Mazzola's stated indignation that Livingston had sought, from his (Mazzola's) secretary, bills and other records relating to electrical work done at his family ranch. Further, notwithstanding the specific language of the complaint, Livingston admitted that Mazzola never mentioned the NLRB during the confrontation and that, rather than his language, Mazzola's ''demeanor'' was what concerned the Charging Party. As with the prior allegation, Mazzola appears to have acted out of personal animosity toward Livingston on this occasion; whatever Section 7 activities in which the latter may have been engaged and Mazzola's belief as to Livingston's motivation in so acting do not appear to have been involved or, indeed, of concern to Mazzola. In these circumstances, Mazzola's conduct during this occasion likewise was insufficient to establish a violation of Section 8(b)(1)(A) of the Act. *Laborers Local 806*, supra; *Laborers Local 496*, supra. Accordingly, I shall recommend that paragraphs 8 and 9 of the consolidated complaint be dismissed.

B. *Cases 20–CB–7279, 20–CB–7550, 20–CB–7691, and 20–CB–8025*

1. The facts

Respondent is a labor organization which represents employees who work as plumbers, pipefitters, steamfitters, and welders in the building and construction industry, in the shipbuilding and repair industry, in the service and repair industry, and in other businesses. At all times material, Mazzola and his son Larry were, respectively, the business manager and assistant business manager of Respondent. The record establishes that Respondent's territorial jurisdiction includes five northern California counties (San Francisco, Marin,

Sonoma, Mendocino, and Lake) and that Respondent maintains business offices and hiring hall facilities in three cities (San Francisco, San Rafael, and Santa Rosa) in order to serve its employee-members. At all times material, Jim Kazarian and Greg Speranza were business agents assigned to the San Francisco office; and Fred Castro and Raymond Springer were the business agents assigned to the San Rafael and Santa Rosa offices, alternating at said facilities. The record further establishes that, with regard to the building and construction industry, Respondent has had successive combined labor agreements with three multiemployer associations (Mechanical Contractors Association of Northern California, Plumbing-Heating-Cooling Contractors Association of Marin, Sonoma, Mendocino Counties, Inc., and Plumbing & Mechanical Contractors of San Francisco, Inc.), (MLA), the most recent of which is effective until June 30, 1990. In addition, Respondent maintains independent agreements with employers who are not members of either of the three multiemployer associations, and so-called project agreements with employers, covering particular jobs and no others.

Pursuant to these various collective-bargaining agreements, Respondent exists as the exclusive source of employees for signatory contractors and operates hiring halls at its San Francisco, San Rafael, and Santa Rosa facilities for the purpose of receiving work orders and dispatching employees. The rules and regulations governing the operation of Respondent's exclusive hiring hall are set forth in article II of the MLA and are posted at each of the above facilities. Pursuant to said operational rules and regulations, Respondent is required to maintain separate out-of-work lists[3] for each of the above crafts and separate such lists, within each craft, for each seniority group;[4] dispatch applicants are registered on the appropriate craft out-of-work list in the order of time and date of registration and in the highest seniority group for which they qualify. With regard to the dispatching of employees, subject to certain enumerated exceptions, this must be done in the order in which names appear on the out-of-work list, commencing with SG-1 and successively through the remaining seniority groups. The specified exceptions are as follows: (1) requests for ''key men'' (foremen, supervisors, or general foremen) must be honored without regard to the individual's place on the out-of-work list;[5] (2) requests for SG-1 individuals who had been laid off within 30 days of said request and who had worked for the signatory contractor in excess of 120 days during the 12-month period preceding the request; (3) requests for individuals with ''special skills and abilities'' will be honored without regard to position on the out-of-work list;[6] and individuals may be requested by name and dispatched regardless of position on the out-of-work list provided that the individual has been registered on the SG-1 out-of-work list for a minimum of 3 working days and that the requesting signatory contractor ''has first obtained an individual from the hiring hall on an unnamed basis. . . . *The first employee requested by the Employer must be on an unnamed basis*.'' (Emphasis added.)[7] Further, an applicant must be present in the hiring hall when his name is called to receive a dispatch. Finally, in order to maintain his position on the out-of-work list, an applicant must reregister in person at least once each week; an applicant may retain said position until he has had at least 5 days of work or unless he ''turns down dispatch offers or job offers on three different jobs which he is qualified to perform.''[8]

On or about September 11, 1986, Respondent and the multiemployer associations, signatory to the existing MLA, entered into agreements which significantly altered the contractual hiring hall rules pertaining to the employee-members' eligibility for dispatch. One memorandum of understanding (G.C. Exh. 4) indefinitely suspended the hours of work requirements for SG-1 and SG-2 and reads as follows:

> WHEREAS, the U. A. Local 38 Collective Bargaining Agreement of July 1, 1984 to June 30, 1990 provides in Article II, Section 14(a), that in order to be on Seniority Group I, Plumbers and Pipefitters have to be employed by a contractor, party to the Agreement for a period of at least one-thousand (1,000) hours each year during the two (2) calendar years preceding the year negotiation is effected on the out-of-work list, and
>
> WHEREAS, there is a similar hour of employment provision required in Seniority Group II in Article II, Section 14(b), and
>
> WHEREAS, the present employment situation is such that there are very few Plumbers and Pipefitters who receive the requisite number of hours of work in order to qualify for the Seniority Groups I & II so that it is not practical to require these hours of employment to qualify for these respective Seniority Groups, and
>
> WHEREAS, it would be grossly unfair to remove a person from the Seniority Group Lists for reasons beyond their control, it is, therefore, agreed between the

[3] Out-of-work lists are maintained at each of the three hiring hall offices. An employee-member may register on each list, and the lists are separate for each office. However, once an individual is dispatched off of any of the three lists, he forfeits his position on the lists at the other two offices.

[4] The contractually established seniority groups are as follows: seniority group I (SG-1) consists of plumbers and pipefitters who have been employed by signatory contractors for, at least, 1000 hours each year during the 2 years immediately preceding the year of registration on the out-of-work list; seniority group II (SG-2) consists of plumbers and pipefitters who have been employed by signatory contractors for, 1000 hours in 2 out of the 5 years immediately preceding the year of registration on the out-of-work list; seniority group III (SG-3) consists of plumbers and pipefitters who have worked for, at least, 1000 hours in 2 out of the 5 years immediately preceding the year of dispatch off of an out-of-work list in the greater San Francisco Bay Area or in an industry other than the building and construction industry within Respondent's territorial jurisdiction; seniority group IV (SG-4) consists of other qualified plumbers and pipefitters; and seniority group V (SG-5) consists of unqualified plumbers and pipefitters, as defined under the MLA, who have been employed by signatory contractors.

[5] This exception is subject to the requirement that no such request for key men from any seniority group beneath SG-1 shall be honored if there are individuals remaining on the out-of-work list in SG-1 who possess the necessary experience.

[6] In determining the existence of special skills and abilities, the dispatcher may rely on his own personal knowledge or an applicant's designation of his own skills.

[7] The MLA specifies that no employee shall be dispatched on a by-name basis who is not in SG-1.

[8] The relevant dispatch procedural rules are attached hereto as Appendix II.

> employers, parties to the U. A. Local No. 38 Collective Bargaining Agreement and Local Union No. 38 that the hour requirements provided in these provisions be suspended until such time as the employment situation changes so as to make the hours of employment requirement practical at which time the parties will meet to consider the reinstitution of the hour requirements for the Seniority Groups I & II.

Another memorandum of understanding (G.C. Exh. 5) made it easier for signatory contractors to request, by name, employees who had been laid off by it within the previous 30 days. It states:

> WHEREAS, the U. A. Local 38 Collective Bargaining Agreement of July 1, 1984 to June 30, 1990 provides in Article II, Section 16(b), as follows:
>
> ''MEN TERMINATED WITHIN THIRTY (30) DAYS. Written requests by contractors for particular plumbers or pipe fitters from Group I who have been laid off or terminated by the contractor within thirty (30) days prior to the request and were employed by the requesting contractor for a period in excess of one hundred twenty (120) working days during the twelve (12) months preceding the request, shall be honored without regard to the man's place on the out-of- work list, provided the applicant has not obtained employment in excess of five (5) days since the time of termination.''
>
> WHEREAS, the present employment situation is such that the jobs are of shorter duration so that the plumber and pipe fitter whom the contractor is calling by name must be employed for the required one hundred twenty (120) working days, is not practical, it is therefore, agreed between the employers, parties to the U. A. Local No. 38 Collective Bargaining Agreement and Local Union No. 38 that this requirement be suspended until such time as the employment situation changes so as to make this requirement practical at which time the parties will meet to consider the reinstitution of this requirement.

A third modification of the hiring hall rules adopted by the parties on or about that date increased from 5 to 10 the number of days an employee would have to work before he lost his position on the out-of-work list.

As to the necessity for said modifications, Larry Mazzola testified, without contradiction, that the early 1980s were years of significant levels of work for Respondent's employee-members, especially steamfitters. During this period, with work beginning on new geothermal plants in Marin County and rapidly increasing high rise construction project work in San Francisco, employment opportunities were plentiful for Respondent's members and many nonmembers applied for work out of the hiring hall. However, in the middle of the decade, according to Jim Kazarian, quite unexpectedly, the geothermal, or ''geysers,'' projects, which were supposed to provide work for employee-members for, at least, 20 years, ceased. Also, voters in San Francisco approved a so-called ''no growth'' proposition, which imposed a height limitation on any new construction, made building codes more restrictive, and placed a moratorium on the locations of new construction. The impact of both events on Respondent were catastrophic. Work opportunities, which once had been readily available, suddenly became scarce, Respondent's out-of-work lists became quite lengthy, and what jobs became available were, for the most part, of a short duration. According to Larry Mazzola, with decreased employment at long-term projects and members out of work for long periods of time, it became evident to Respondent's leadership, in 1986, that the contractual hiring hall rules were ''too restrictive'' to enable most members to have a ''fair'' opportunity for obtaining work. What they anticipated was that many SG-1 members would not work 1000 hours in 1986 and, consequently, drop into SG-2 for 1987, resulting in only the small remaining number of SG-1 members being eligible for most of the available work and always remaining ahead of the expanded SG-2 roster on the out-of-work lists. Accordingly, after exploring the matter with the signatory multiemployer associations, Respondent and the former agreed on General Counsel's Exhibit 4 in effect a merger of the SG-1 and SG-2 membership lists[9] and giving all those eligible employee-members an equal opportunity to obtain jobs. With regard to the modification set forth in General Counsel's Exhibit 5, Mazzola explained that ''we decided the 120 days was too restrictive'' inasmuch as contractors were having employees work on shorter duration jobs and, consequently, being unable to rehire them by name due to the mandated period of prior work for the requested employer. Mazzola asserted that the merger of the seniority groups resulted in no position changes on the out-of-work lists but conceded that some registrants may, indeed, have been dispatched over those who previously had been in a higher seniority group. According to him, the suspension of the 120-day prior employment requirement resulted in no physical changing of the out-of-work lists.

While the General Counsel does not challenge the necessity for the foregoing hiring hall rules modifications, the adequacy of the notice to hiring hall applicants is at issue. Larry Mazzola testified that, on the execution of the above-described documents ''we notified the dispatchers'' and instructed them to notify the hiring hall users as to the changes. He added that he was never subsequently present at one of the hiring halls when rule changes were announced and that no other steps, other than ''word of mouth,'' were contemplated for so informing applicants. Kazarian corroborated Mazzola as to being informed of the aforementioned hiring hall rules modifications and as to Mazzola instructing him ''to notify the members that were out of work . . . about what had transpired.'' Notwithstanding that the contractual hiring hall rules were posted, Kazarian testified that he informed applicants of the changes ''verbally'' when they ''asked me about the list that they were in fear of coming off the list.'' He added that ''I also went out and told other people that were there in the dispatch office'' but admitted never posting copies of either memoranda and conceded not being able to say that he told every job applicant of the changes.[10] As did Kazarian, Raymond Springer, the business

[9] Mazzola was unaware of the merger of or elimination of any other contractual seniority group.

[10] Despite his concession, Kazarian maintained that all SG-1 members were aware of the eligibility rule modification, including those whose work on jobs prevented them from coming to Respondent's hiring hall until sometime in 1987. Kazarian claimed that he particu-

agent at Respondent's San Rafael facility until August 1987, learned of the hiring hall rules modifications in September 1986 and was instructed to notify users as they returned to the hiring hall. Springer testified that the merger of SG-1 and SG-2 was an issue at that time as work was ''more or less stopping'' at the geysers project and members were concerned about finding enough work to maintain their hours. While apparently posting nothing regarding the modifications, Springer testified, ''as the men would come in . . . I would bring up the subject . . . because it had been quite a bone of contention in that area . . . and sometimes even walk out where the men were sitting and talk to them.'' However, as did Kazarian, Springer conceded not being able to recall how many hiring hall users he informed about the rules modifications but averred having mentioned it ''many, many times'' to them.

The Charging Party, Ed Bermingham, has worked in the building and construction industry as a steamfitter for many years and has been a member of Respondent for approximately 12 years. Testifying that he personally never was informed by any of Respondent's business agents during 1987 as to either a merger of the two highest seniority groups or the suspension of the 120 employment days' requirement,[11] Bermingham, as does the General Counsel, disputes the validity of these hiring hall rules modifications and maintains that, for purposes of dispatching to available jobs during 1987, his eligibility for such should have been as a member of SG-1 among Respondent's member-steamfitters. In this regard, the record discloses that Bermingham worked 1049 hours during 1983; that he was credited by the administrator of the contractually established fringe benefit trust funds with having worked a total of 1064 hours in 1985; that, during 1986, he was employed by Atkinson Mechanical Contractors Co. from May 18 through September 5 and by Amos and Andrews, Inc. from the pay period ending September 19 through November 28; and that Bermingham physically worked a total of 957.5 hours for the said contractors in 1986 but received payment for 1,005.95, reflecting a contractually established multiplier of time-and-a-half for the approximately 97 overtime hours he worked for Atkinson Mechanical.[12] Notwithstanding Bermingham's belief that, based on the foregoing, he was, in fact, eligible for Respondent's membership SG-1 during 1987, he became aware of Respondent's contrary view and of the existence of a problem, regarding the computation of his 1986 work hours, in May or June 1988 when Jim Kazarian told him ''You don't have enough hours to be group 1.'' In this regard, article II, section 14(a), of the existing MLA, states that, in determining eligibility for SG-1, ''the dispatcher shall have recourse to the records of the Trust Fund for the two (2) calendar years preceding the year in which the dispatch occurred,'' and article II, section 14(f) reads:

> In the event of any doubt as to whether an applicant has met the one thousand (1,000) hour requirement, the dispatcher shall have discretion to resolve the matter by accepting as final either (a) a letter from the Health and Welfare Fund in the area in which he claims to have worked or, (b) records of previous employers.

The record establishes that Kazarian's assertion to Bermingham was based on a June 16, 1988 memorandum from Frank Sullivan, the administrator of the contractually-established fringe benefits trust funds, to the former (G.C. Exh. 10). Sullivan testified that the trust funds credited Bermingham with having worked no more than 957.5 hours in 1986, based on the total regular and overtime hours he worked for Atkinson Mechanical (recognizing that no contractual multiplier existed for overtime hours in computing the credited trust fund hours) and the straight-time hours he worked for Amos and Andrews. Sullivan further testified that, when he reports hours to Respondent, he is concerned only with the ''hours contributed for'' and that, noting the contractual discrepancy between work hours for purposes of wages and fringe benefit contributions, ''the wages can vary as to their requirements. They could be double, they could be time and a half, they could be straight time all the way through. The trust fund records are not interested in wages.'' He added that, under the MLA, a multiplier is applied to overtime hours credited for trust fund contributions; however, such did not apply to the Charging Party when he worked for either contractor.

The crux of the instant unfair labor practice allegations involves Respondent's failure to refer hiring hall applicants, including Ed Bermingham, to available jobs since January 1, 1987, as a result of its implementation of the aforementioned allegedly unlawful modifications of the operating rules and regulations for its exclusive hiring hall and other such changes which will be discussed infra. In addition, it is alleged that, since May 28, 1987, Respondent has discriminatorily failed and refused to refer Bermingham to jobs for which he was eligible and qualified. With regard to the latter allegation, the record reveals that the Charging Party, despite regularly registering on the steamfitter out-of-work lists at Respondent's San Francisco, San Rafael, and Santa Rosa offices, worked just 424 hours in 1987 and 1 day and 2 hours in 1988 and that, during said years, he persistently complained about perceived violations of the contrac-

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larly sought out these latter individuals but couldn't be certain all knew of the rule change.

[11] Jim Kazarian asserted that he specifically informed Bermingham about the merger of the seniority groups in early 1987 during a conversation about another member, Mike Murphy. The business agent recalled Bermingham ''asking me about why we merged group 1 and 2 and I said. . . . They merged them all. They merged both those books so what are you worried about?'' During cross-examination, Kazarian reiterated telling Bermingham ''specifically'' about the seniority group merger; however, Kazarian was thereupon confronted with his pretrial affidavit wherein he stated that he never specifically told Bermingham that the seniority groups had been merged but only that he (Bermingham) did not have enough hours to be eligible.

Philip Livingston corroborated Bermingham, stating that, on the occasions of his visits to any of Respondent's hiring halls in 1987, he likewise never was informed about any merger of the seniority groups.

[12] There is no dispute that, during 1986, Bermingham worked overtime hours for Atkinson Mechanical but only straight-time hours for Amos and Andrews. Rather than being bound to the terms and conditions of the existing MLA, Atkinson Mechanical and Respondent were parties to one of the above described project agreements. Pursuant to said agreement, notwithstanding the overtime hours multiplier for the payment of wages and unlike the terms of the MLA, there existed no such multiplier for purposes of credited trust fund hours.

tual dispatch, hire, and layoff provisions by both signatory contractors and Respondent. Thus, he filed, at least, eight contractual grievances against contractors for whom he had worked, alleging improper layoffs, and filed several internal union grievances in which he complained about the conduct of specified officials and business agents, including Jim Karazian, in operating the hiring halls. In addition, commencing in May 1987 and continuing through 1988, Bermingham filed no less than 10 unfair labor practice charges with the Board, alleging Respondent's unlawful conduct involving its hiring halls. On one occasion in February 1987, according to Bermingham, he orally complained to Kazarian about a layoff from Atkinson Mechanical, arguing that another individual, Mike Murphy, with an assertedly lower seniority group standing,[13] should have been laid off before him and that he (Bermingham) should be allowed to utilize the contractual bumping procedure to replace Murphy on the job.[14] According to Bermingham, Kazarian told him that he was a member of SG-1 and that he had bumping seniority over Murphy.[15] Thereafter, the Charging Party testified, Kazarian called him and said that the contractor had agreed to reinstate him to work.[16] Kazarian testified to a different version of what occurred,[17] stating that when Bermingham asserted his right to bump Murphy from the job, ''I told him he didn't have that right, that they were both . . . group 1. . . . How can you bump somebody's whose group 1?'' However, when confronted with his pretrial affidavit wherein he stated that, during the processing of a grievance, he told Bermingham ''that [the latter] does have the right to bump another employee that is in a lower seniority group,'' Kazarian admitted that his affidavit statement was correct.

Counsel for the General Counsel argues that a series of comments by Respondent's officers and business agents demonstrate its animus toward Bermingham resulting from his above-described acts and conduct. Thus, Bermingham testified that, in October 1987, after receiving a dispatch to a job from Kazarian, he overheard the latter tell another member, ''That son of a bitch has charges against me and I've got to give him a job.'' Kazarian failed to deny this comment. Next, in early February 1988 while at the San Francisco hiring hall, Bermingham asked business agent Greg Speranza to call the Santa Rosa office to enable the Charging Party to ascertain if his name remained on the out-of-work list there. Ray Springer answered, and Bermingham asked if his name was still on the list and said he wanted it to remain there. Springer replied ''that because of the commotion you've been causing down at the Union you're going to have to come in and sign the list.''[18] Springer recalled a different telephone conversation with Bermingham during which the latter inquired as to his place on the out-of-work list. After the business agent told the Charging Party that he was not on the list and the latter asked why, Springer assertedly told him that his name had been removed from the list after he (Bermingham) had been dispatched to work from San Francisco and that he had failed to check back with Santa Rosa since that time. Eight days later, according to Bermingham, he followed the same procedure, on this occasion asking Speranza to telephone the San Rafael office to permit him to speak to Fred Castro, the business agent assigned to that office. As in the previous conversation, Bermingham asked if his name remained on the out-of-work list, and Castro responded by accusing Bermingham of being ''Melvin Belli,'' and asking whom he would sue next. Bermingham replied that he had not decided. Castro replied,

[13] The record discloses that Mike Murphy had worked as a steamfitter in the ship repair industry and that, while a member of Respondent, he was covered under the terms and conditions of employment of a different collective-bargaining agreement than building and construction industry steamfitters. In June 1985, Murphy, who had the requisite work experience and ability to be classified as a journeyman, requested that he be transferred to Respondent's building trades eligibility list and that he be given credit for his seniority (he was eligible for SG-1) under the ship repair industry contract. The record further discloses that Jim Kazarian and Larry Mazzola sponsored Murphy's request and that Respondent's executive board approved it in July 1985. Thereafter, Murphy worked as a journeyman steamfitter in the building and construction industry, apparently with his seniority retained. G.C. Exh. 8, a compendium of the credited hours of work for various named steamfitters during the years 1982 through 1987, nevertheless discloses that Murphy was not credited with any work hours in either 1985 or 1986 and for just 884 hours in 1987.

[14] Art. II, sec. 25 of the existing MLA concerns ''bumping seniority'' and states that ''unemployed workmen from Group 1 shall have the right to replace any workmen not dispatched from Group 1 provided he is able to do the work. In effecting such dispatch, the dispatch shall be made from those on an out-of-work list in Group 1 in the order in which their names appear on the list. The dispatcher shall maintain a list of persons, who to the best of his knowledge, are currently employed and were not dispatched from Group 1 and are not now qualified for Group 1.'' The provision continues, requiring the hiring hall dispatchers to ''post'' the positions which are filled by the above individuals and specifying times of the week for job ''bumping'' to occur.

Counsel for Respondent stated that the bumping provision has been included in successive MLAs since, at least, 1948, that he believes said provision is violative of the Act and unenforceable, and that he has instructed Respondent's officials not to utilize said provision. In this regard, Jim Kazarian testified that, to his knowledge, Respondent has never permitted sec. 25 or its predecessor clauses to be utilized in order to remove an employee from a jobsite.

[15] Bermingham maintained that Respondent has never complied with the MLA requirement to keep lists of those in seniority groups lower than SG-1 who were working and of the positions they held. Therefore, he maintained, ''they did not let me exercise my right to the bumping seniority so I lost it.'' Kazarian conceded that nothing ever was posted pursuant to the MLA bumping provision.

[16] According to Bermingham, Kazarian told him that he (Kazarian) had visited the jobsite and told the foreman that, under the MLA, Bermingham had the right to bump Mike Murphy from the job and that the foreman had the choice of laying off Murphy or keeping Bermingham and Murphy on the job. The foreman chose the latter option.

[17] Kazarian testified that the contractor was Amos and Andrews (not, as Bermingham stated, Atkinson Mechanical) and that Bermingham had been laid off due to insubordination and dissatisfaction with his work. Further, after Bermingham complained to him about the layoff, he (Kazarian) visited the jobsite and persuaded the foreman to reinstate Bermingham. Kazarian maintained that such had nothing to do with the contractual bumping procedure and that said procedure has never been utilized during his employment by Respondent

[18] There is no dispute that, notwithstanding the contractual hiring hall rules and the San Francisco requirement of such at least once a month, personally signing the out-of-work lists was not a requirement at either San Rafael or Santa Rosa.

''Eddie, you're going to starve to death doing that.'' Fred Castro conceded making the ''Melvin Belli'' remark, stating that such was in the context of ''joking'' with him and that, after Bermingham said ''more'' lawsuits would follow, he (Castro) said, ''Yes, even if it breaks you you'll keep suing.'' Finally, counsel points to General Counsel's Exhibit 23, a letter from Joseph Mazzola to all building trades members of Respondent, dated September 6, 1988, in which Respondent's business manager commented on the motivation of Philip Livingston and Ed Bermingham in filing unfair labor practice charges with the Board and complaints with the Department of Labor. He wrote:

> What the motives of Livingston and Bermingham are is unclear and who is financing them is unknown to me. But, one thing is certain. They appear determined to smear the reputation of Local Union 38 and its officers and, if they could, to completely destroy our local union. Their actions are clearly maliciously intended and they are designed in every manner possible to harass the officers and agents of this local union and to cause the union to expend finances from the union treasury to defend itself against their unsupported and unsubstantiated charges.

Before analyzing the allegedly unlawful job referrals resulting from Respondent's failure to adhere to its contractually established hiring hall rules and procedures and its discriminatory motivation against Ed Bermingham, it is important to understand the functioning of the hiring hall's dispatch system. In this regard, out-of-work job applicants are registered on the applicable craft hiring hall out-of-work lists in the order in which they have registered, with their places preserved each month unless dispatched to jobs which last longer than 5 days. In order to indicate their continued availability for dispatch, individuals, who have registered on the San Francisco out-of-work lists, must sign the applicable list, next to their name, once a month;[19] failure to do so results in removal of the applicant's name from the applicable list. Jim Kazarian testified that the business agent, who is acting as the hiring hall dispatcher, normally becomes aware of job calls from contractors each morning. Said job referral orders indicate the type of work, the number of workers needed, and whether the referral is for a ''by name'' call, a specialty job, or for a ''key'' man (foreman). If the work order is just for people off the applicable list or a by-name order (whereby an equal number of workers must be taken off the applicable out-of-work list), applicants are supposed to be called off the list in the order in which their names appear. Prior to the September 1986 merger of the two highest seniority groups and in accordance with the terms of the MLA, such meant that the dispatcher was required to go through the names of all SG-1 members on an out-of-work list before calling the names of those in lower seniority groups. Subsequent to September 1986 (at least, for each month of 1987 and 1988), notwithstanding that the merger nominally only combined seniority groups 1 and 2, dispatching appears to have been done without regard to any seniority groupings, with applicants who were qualified only for SG-3 or lower being dispatched before SG-1 or SG-2 members if the former names were higher on the out-of-work list.[20] On this point, analysis of the 1987 and 1988 steamfitter out-of-work lists discloses no demarcation between members of the different seniority groups or notations beside any name stating the applicant's seniority group. Unlike the procedure utilized at the San Rafael or Santa Rosa hiring halls, at which the dispatchers would telephone applicants regarding job referrals,[21] in order to receive a dispatch from the San Francisco hiring hall, an applicant must follow the procedures of the MLA and must be present when his name is called. Bermingham, who maintained that, during 1987 and 1988, he was at the San Francisco office two or three times a week,[22] testified that the ''same rules apply'' to by-name calls—that the individuals so called must be present at the hiring hall to receive the dispatch. Kazarian, who disputed Bermingham's testimony as to the frequency of the latter's visits to the hiring hall, contradicted Bermingham as to the need for the by-name-called individual to be physically present—''he's being called by name. I can't send anybody else out. . . . I can't just replace him with another name call. [The employer] is asking for that name call.'' Finally, with regard to by-name calls and the contractual requirement that the contractor request an equal number of workers from the out-of-work list, Bermingham, noting the language of article II, section 16(e) that the off-the-list individuals must be hired first and be on the contractor's payroll before employees can be requested by name, testified that Respondent's standard practice was normally to follow the contractual procedure for such hiring. Contrary to the language of the MLA and to the Charging Party, Kazarian testified that such work orders are normally filled on the day of receipt inasmuch as both the named and the unnamed worker are normally needed at the same time and that, strictly adhering to the contractual rule, would be impractical.

[19] As stated above, no such requirement was enforced at either the San Rafael or Santa Rosa offices; however, after his conversation in February 1988 with Ray Springer, according to Bermingham, he visited the Santa Rosa office on a monthly basis in order to sign the steamfitter out-of-work list next to his name.

[20] Analysis of the 125 allegedly unlawful dispatches discloses that, on numerous occasions, individuals who were only qualified for SG-3 or lower were dispatched to available jobs prior to Bermingham, whose name appeared below those of the former individuals on the out-of-work list. At the hearing, counsel for Respondent conceded that SG-3 members and below were not specifically included in the seniority group merger but argued then and in his posthearing brief that the *effect* of the seniority group merger was that individuals needed to have worked just one hour under the MLA to become eligible for postmerger status as SG-1 members.

[21] Raymond Springer testified that, at the Santa Rosa office, he never demands that applicants be present at the facility in order to be dispatched and that he informs them of referrals by telephone. He follows this procedure given ''the cost of them running to the Santa Rosa hiring hall,'' which to Springer is ''overbearing.'' Fred Castro testified at the initial hearing that, at San Rafael, he uses the same procedure—''I call.'' He added that he copied Springer as to this. When the hearing reopened in November, Castro contradicted his earlier testimony, stating that applicants ''have to be in the hiring hall to be dispatched.'' He added that such has been his policy ''since I took over.''

[22] Bermingham stated that he would vary the days when he would be at the hiring hall in order to ''try to figure out what days most people are getting dispatched. . . . I'm trying to outguess people as to when they're going to hire people.'' His purpose was to ''be present when [the dispatcher] was to dispatch somebody to a job.''

As stated above, notwithstanding that there are allegedly unlawful job referrals, about which no evidence was adduced, of otherwise eligible hiring hall work applicants being passed over for dispatches in 1987 and 1988 as a result of Respondent's alterations of the contractually established hiring hall rules and procedures, counsel for the General Counsel only proffered evidence with regard to 125 such assertedly improper dispatches—all involving Bermingham and allegedly resulting from the foregoing or, since May 28, 1987, Respondent's animus against him. The information pertaining to each is included in General Counsel's Exhibit 25.[23] The initial one (1) was a January 5, 1987[24] Santa Rosa dispatch of Frank Aguilar to Brock & Blevins at a time when Aguilar was 2d on the steamfitters out-of-work list, and Bermingham was 37th on the list. According to business agent, Fred Castro, this was a call '''off the list,' and the number one on the list I could not reach, so I went to Frank Aguilar,'' who, the trust fund hours of work records (G.C. Exhs. 8 and 9) establish, was qualified for SG-2 for 1987 dispatch purposes. Castro further started that the dispatch of Aguilar was the unnamed off-the-list part of the by-name dispatch (2) of Robert Chestnut, whose name appears beneath that of Bermingham on the Santa Rosa out-of-work list and who was qualified for SG-2 in 1987, to Brock & Blevins on the same day.

The next three allegedly unlawful dispatches were, according to Jim Kazarian, by-name calls for foremen from San Francisco. These were a dispatch of Bill Johnson (3) to Linford Air on January 12, a dispatch of Harry Hoffer (4) to Vann Engineering on January 13, and a dispatch of Bryan Conkling (5) to McClanahan Plumbing on January 26. As to these, the record discloses that Johnson was 26th on the January San Francisco out-of-work list when Bermingham's name was the 52d and was eligible for SG-2 in 1987; that Hoffer's name was immediately above that of Bermingham on the list and he was eligible for SG-2 at the time; and that Conkling was 39th on the San Francisco list and was an SG-2 member. Regarding the referral of hiring hall applicants to positions as foremen (key men), Kazarian testified that, pursuant to the MLA's hiring hall rules, by-name requests for foremen must be honored regardless of the individual's positions on the out-of-work list, provided that requests for employees in seniority groups lower than SG-1 cannot be honored if experienced SG-1 eligible members are higher on the list. He added, however, that the agreed-upon suspension of the MLA's work hours requirements for seniority groups 1 and 2 eligibility and the resultant merger of said seniority groups rendered adherence to the seniority group language of key men provision unnecessary. Arguing that the implementation of the seniority group merger unlawfully altered the contractual hiring hall rules and that, at all times Bermingham has been eligible for SG-1, both he and counsel for the General Counsel assert that he should have been given these dispatches inasmuch as Bermingham had foreman experience, having worked as such for Atkinson Mechanical in 1986.

Of the next three San Francisco dispatches, according to Kazarian, two were made at times in which Bermingham was not present at Respondent's dispatch office and the third was for a refrigeration fitter. Charles Ciraolo (6) was dispatched to Linford Air as a journeyman on January 21, and Al Baskin (8) was dispatched to Scott Broadway Co. on February 9. Kazarian testified that both dispatches were ''off the list'' and that Kazarian was not present on either occasion. With regard to the Ciraolo referral, his name was beneath that of Bermingham on the January steamfitters list, and his seniority group for 1987 dispatches would have been SG-3 or lower. As to Baskin, he was 14th on the February list; while Bermingham's name was 44th. As was Ciraolo, Baskin would have qualified for SG-3 or lower in 1987. Concerning his presence at the San Francisco dispatch office, Bermingham, at first, insisted that he had been present at the applicable location on each of the 125 occasions at issue herein; later, he changed his testimony, stating that it ''was never my contention I was there for every one of them.'' Rather, he added, he was present for ''most of them.'' Specifically, as to the Ciraolo and Baskin dispatches (G.C. Exh. 21), Bermingham's diary of his visits to Respondent's hiring hall locations in 1987, disclose no notations establishing his presence at the San Francisco office on either January 21 or February 9.

As to the contested dispatch 7, the referral of Edward Ortega to Preferred Mechanical on January 27, the record discloses that Ortega was above Bermingham on the out-of-work list and that he was nominally eligible for SG-2 dispatches in 1987. Kazarian testified that Ortega was dispatched as a refrigeration fitter, defining this is as a separate job classification and stating that individuals who are able to do this type of work are, for purposes of convenience, dispatched off of the steamfitters out-of-work list. Indeed, the MLA requires hiring hall applicants to fill out workcards, indicating the different types of work for which they are qualified, and these are categorized as steamfitter, plumber, pipefitter, welder, and refrigeration mechanic. Further, Bermingham agreed that refrigeration work is a separate job classification, one in which ''I haven't worked,'' and that he was not qualified to perform ''any'' aspect of it. Finally, in this regard, examination of the out-of-work lists in the record establishes that applicants, who were qualified to perform refrigeration mechanic work and whose names appear on the lists, place the notation ''REF'' next to their names, indicating their work classification.[25]

The next four disputed dispatches were from the Santa Rosa out-of-work list to R.C.I. as journeymen steamfitters:

[23] In discussing the allegedly unlawful dispatches, the number, corresponding to the number of each within G.C. Exh. 25, shall be given in parenthesis.

[24] Until stated, the following dispatches were in 1987.

[25] Several of the remainder of the disputed referrals involve dispatches of refrigeration mechanics. These dispatches include: James Tway (19) to Con-Air on April 6; Ted Terstegge (21) to Carrier Service on April 7; Terstegge (29) to Linford Air on May 19; Frank DiGrande (37) to Hussman on June 15; Paul Buyama (49) to Control Temp, Inc. on August 13; Richard Roberson (50) to the same contractor on the same date; Ed Wible (58) to Vann Engineering on September 8; Wible (79) to Oda Refrigeration on October 26; Terstegge (95) to Vann Engineering on December 10; Jim Chambers (103) to Carrier Service on January 14, 1988; and Richard McClain (124) to Hussman Refrigeration on September 14, 1988. The record establishes that each individual had noted his classification by writing ''REF'' next to his name on the out-of-work list for the applicable location and month

S.M. Singleton (9) on February 12 and Ron Mazzuchi (11), C.J. Williams (12), and Ron Carrasco (13) on February 13. According to Fred Castro, the acting dispatcher, Singleton, who was eligible for SG-3 or lower in 1987, was called off the list and was above Bermingham on the February steamfitter out-of-work list, and Mazzucchi, who was eligible for SG-2 as of that time, was also called off the list, being higher on the out-of-work list than the Charging Party. As to Williams and Carrasco, Castro explained that they comprised a ''50/50'' by-name call, with the latter the named journeyman and Williams taken off the list. At the time, Carrasco was eligible for SG-2, and Williams, who also was eligible for that seniority group, was above Bermingham on the out-of-work list.

Jim Kazarian testified that the next four allegedly unlawful dispatches were made off the San Francisco steamfitters out-of-work list for March and that such were made at a time when Bermingham was unavailable for dispatch (he was working and did not re-sign the list until March 26). These referrals are: Joe O'Malley (14) (by name) to McClanahan Plumbing on March 6, Jack Lewkowitz (15) to Vann Engineering on March 16, Steve Del Grande (16) to McClanahan Plumbing on March 24, and Paul Gibson (17) to Vann Engineering on March 24. As to Kazarian's testimony, analysis of the entire record, including the applicable San Francisco out-of-work lists, discloses that Bermingham was dispatched to Amos and Andrews in February, that he did not reregister on the out-of-work list until March 26, and that he failed to deny Kazarian's statement. Regarding these dispatches, analysis of the record also discloses that each individual had his name above that of Bermingham on the list, that O'Malley[26] and Lewkowitz were eligible for SG-2 in 1987, and that Del Grande, who came off the list with O'Malley but 18 days later, and Gibson were eligible for SG-3 or lower in March 1987. Another disputed San Francisco dispatch was a referral of Arthur Arevelo (18) to Acco on March 30. He was 5th on that month's out-of-work list and would have been eligible for SG-2. Noting that Bermingham had registered on the list by that date, Kazarian asserted that the Charging Party ''was not present that day'' and that, even had he been at the dispatch office, Arevelo had registered above Bermingham on the list. The latter relied on his 1987 diary (G.C. Exh. 21) to establish his presence at the San Francisco dispatch office on any particular date, and there is an ''at union'' notation for March 30.[27]

The next series of disputed dispatches occurred during April. The first, Eliis Perez (24) to Preferred Mechanical off the San Francisco steamfitters out-of-work list, occurred on April 2 at a time when Perez, who was eligible for dispatch from the SG-3 list in 1987, was 16th on the list with Bermingham being 62d. As to this referral, Kazarian asserted that the Charging Party ''was not present'' and, in any event, would not have received the dispatch given Perez' position on the out-of-work list. Contrary to Kazarian, the April San Francisco list shows Bermingham registering on April 2, and his diary bears the notation ''at union'' next to the date. Further, rather than Kazarian, Greg Speranza was the dispatcher that day. In the latter circumstances, asked how he could know that Bermingham was not present in order to receive a dispatch, Kazarian replied that Speranza told him. The next referral was a San Francisco dispatch of Ron Collins (20) to Alta Mechanical on April 7. Collins' name appears above that of Bermingham on the out-of-work list and, according to Kazarian, the individual had worked for the company, which was owned by his father, continuously until 9 months prior to the disputed dispatch. At that time, Collins had entered a drug rehabilitation program; having completed it, he registered on the list and was dispatched to the employer. According to the trust fund hours record, Collins was eligible for SG-2 in 1987. The next two April allegedly unlawful dispatches were Santa Rosa referrals to Scott Broadway Company on April 10—Joan Hartwig (10) and Bobby Burger (23). Although not entirely clear, Burger appears to have been by-name dispatch with Hartwig being the required off-the-list referral. In any event, both men were registered above Bermingham on the out-of-work list (Bermingham was 62d, with Hartwig 2d and Burger 55th) and were eligible for SG-2 in 1987. A third challenged dispatch to Scott Broadway Co. was given to Dan Byrne (99) on April 21. Byrne, who was eligible for SG-2 dispatches was 67th on the Santa Rosa out-of-work list and beneath Bermingham. However, according to Fred Castro, Byrne was a ''by name'' dispatch. There exists no evidence as to the corresponding off-the-list dispatch. The final disputed April dispatch was off the San Francisco list—Paul Gibson (22) to Vann Engineering on April 27. The record establishes that this individual was registered above Bermingham but would have been eligible for only SG-3 or lower dispatches in 1987. According to Kazarian, Gibson was a ''rehire,'' which, according to the MLA, defines an individual who has been terminated by a signatory contractor within 30 days and who may be rehired without regard to his place on the out-of-work list.[28] In this regard, the individual had been hired by the contractor on March 24, worked a total of 8 days, and reregistered on the list, without losing his position.[29]

There is no dispute that Bermingham was given a travel card by Respondent and that he worked for a contractor in Fresno, California, for 3 days in late April. While Bermingham's diary for 1987 has notations ''at union'' for May 7 and 8 and May 11 through 15, Kazarian stated that he did not reregister on the San Francisco out-of-work list until May 18, and the May 1987 out-of-work list shows May 18 as the registration date. In any event, the initial, disputed May 1987 dispatch was off the San Francisco steamfitters list—Bob Coleman (25) to University Mechanical on May 5

[26] The hiring hall rules and regulations require that only SG-1 eligible applicants may be called by name. In this regard, I note O'Malley's seniority group eligibility and that of several disputed by-name calls infra. Respondent's position is, of course, that the merger of the two highest seniority groups made enforcement of the contractual requirement irrelevant.

[27] Kazarian asserted that ''I can remember 99% of the time whether Mr. Bermingham was [at the hiring hall] or not.'' He averred that he always looked ''to see if he was there. I can't miss [him] [He] always made it a point to sit right across from me where I could visually see him at all times.''

[28] The MLA requirement is that such referral must be eligible for SG-1. Also, of course, the requirement of 120 days of employment during the preceding 12-month period was suspended in September 1986 (G.C. Exh. 5).

[29] As stated above, a third September 1986 modification of the hiring hall rules increased from 5 to 10 the number of consecutive days applicants could work on a job without losing their positions on the out-of-work list.

as a foreman. Kazarian testified that Coleman, who was eligible for SG-2 dispatches in 1987 and above Bermingham on the out-of-work list, was called by name for said position by the contractor.[30] The next disputed dispatch was of Robert Aguillon (26) to H. J. Olson on May 12 as a journeyman. Aguillon's name appears above that of Bermingham on the San Francisco out-of-work list, and, according to the trust fund hours compilation, he was eligible for SG-1 dispatches at that time. According to Kazarian, Aguillon was a ''by name'' rehire by the contractor, having been laid off by H. J. Olson within 30 days of the dispatch, and he was qualified as a ''minority call.''[31] The next allegedly unlawful May dispatch was that of Mike Murphy (27) to Amos and Andrews on May 13. Murphy, who, as discussed earlier, had been allowed to transfer to Respondent's building trades department from its metal trades division without any loss of SG-1 seniority, was, according to Kazarian, a contractually named rehire, having worked for Amos and Andrews from February through April 1987. Also, Kazarian testified, Murphy was dispatched before Bermingham registered on the out-of-work list that month. The next challenged dispatch was of Al Baskin (28) to Alta Mechanical on May 18. Baskin was seventh on the San Francisco out-of-work list for May and, as stated above, was nominally eligible for only SG-3 or lower dispatches. Kazarian states that Baskin received the referral as he was higher on the list than Bermingham. The final disputed May 1987 dispatches off the San Francisco list were to Alta Mechanical on May 21[32]—Chris Reyes (30) and Ron Ash (31). The latter was a named dispatch, with Reyes going off the list with him. At the time, both individuals were qualified for SG-2 dispatches, and Reyes was above Bermingham on the out-of-work list.

The next series of disputed dispatches were in June from Respondent's San Francisco hiring hall. During that month, Bermingham was 33d on the steamfitters out-of-work list. The initial referral was of Ralph Beeker (32) to University Mechanical as a journeyman on June 3. Beeker, who, according to the trust fund hours compilation, was eligible for SG-2 dispatches at that time, was 20th on the out-of-work list and, Kazarian testified, was given the referral based on his higher position on the list. The next referral was also to University Mechanical on June 3 and was given to Al Baskin (33). Noting that Baskin, who was eligible only for SG-3 dispatches, had received a recent referral on May 18, Kazarian testified that the job had lasted just 9 days, that, as a result, Baskin did not lose his high position on the out-of-work list, and that he was given the University Mechanical dispatch over Bermingham solely based on his higher position on the list. The third challenged June dispatch was given to Ralph Beeker (34) for McClanahan Plumbing on June 15. According to Kazarian, ''My recollection is that . . . [the prior dispatch to University Mechanical] had to be a short job, 10 days or less.'' The fourth allegedly unlawful referral was of Jack Lewkowitz (35) to University Mechanical on June 15 as a foreman. Noting that Lewkowitz, who was eligible for SG-2 dispatches in 1987, was beneath Bermingham on the out-of-work list, Kazarian stated that the employee had been called by name, pursuant to the MLA, for the key man position. The next disputed dispatch was of Clyde Sumpter (36) to University Mechanical as a journeyman on June 25. The trust fund work hours compilation establishes that Sumpter was eligible for SG-3 dispatches in 1987, and his position on the June out-of-work list was fourth. According to Kazarian, Sumpter's dispatch resulted from his position on the list. The final allegedly unlawful June 1987 was given to Bill Durand (38) on June 27; however, according to Kazarian, it should not be categorized as a referral. Thus, he testified, Durand, who signed the out-of-work list on April 20, ''was involved in a [physical altercation] which resulted in a suspension from the employer. . . . I resolved the dispute . . . and Mr. Durand was reinstated and back to work on June 27.'' The business agent conceded that Durand's name was below that of Bermingham on the list.

With regard to July 1987, there are several allegedly unlawful dispatches mainly from Respondent's San Francisco office with four from its Santa Rosa dispatching facility. The first was Juan Salsado (39) to Quantum Industries on July 1 as a journeyman. On the San Francisco July steamfitters out-of-work list, Bermingham was 39th, and Salsado, who was qualified for SG-1 in 1987, was beneath him at 53d. Kazarian testified that the former had worked for Quantum Industries for 2 months in 1986 and from January 1987 through June 21 and that he was a contractually named rehire within the 30-day time period. Thus, Kazarian asserted, Salsado could be dispatched regardless of his position on the out-of-work list. The next challenged dispatch was that of Clyde Sumpter (40) to Amos and Andrews as a journeyman on July 13. Noting that the individual had previously been dispatched on June 25, Kazarian stated that ''he did not work 10 days'' after the prior referral and that ''he must have been laid off and retained his spot.'' In this regard, Sumpter, eligible for SG-3 in 1987, was fourth on the July list. The next challenged referral was Ron Carrasco (41) to Linford Air as a journeyman on July 13. According to Kazarian, Carrasco, who was eligible for SG-2 in 1987, was 15th on the out-of-work list and received the dispatch as he was before the Charging Party on the out-of-work list. The next assertedly improper dispatch was of A. G. Van Dyke (42) off the Santa Rosa office out-of-work list to Newtron, Inc. on July 15. In July, Bermingham was 50th on that office's list; while Van Dyke, who, according to the trust fund records, was qualified for SG-3 dispatches in 1987, was 1st on the list. Given his placement on the out-of-work list, although doubtful that the individual could perform the required work,[33] Raymond

[30] Kazarian could recall only two instances when foremen were not requested by name. He added that such was the case as a contractor ''would want the most competent person that he could get and that he knows. . . . He's not going to rely on anybody else.''

As stated above, the MLA permits foreman to be taken from lower seniority groups, provided that no experienced SG-1 members are available. Also, as stated above, Bermingham believed himself qualified for such a position.

[31] Kazarian states that, although not contractually mandated, contractors, who are given work under Federal and state regulations and who are required to hire minority workers, may request minorities under the same circumstances as named dispatches—one person off the list for every minority sent. Further, Respondent dispatches the minority regardless of position on the out-of-work list.

[32] From this date forward, according to the complaint, the allegedly unlawful failures to dispatch Bermingham also resulted from Respondent's discriminatory intent.

[33] The job to which Springer referred Van Dyke involved a type of steamfitter work called ''control'' fitting. Business agents Kazarian, Springer, and Castro each testified that this is ''special-

Springer, who was dispatching from Santa Rosa at the time, gave Van Dyke the referral. The next disputed dispatch was from San Francisco to Mike Gallelo (43) for Johnson Control on July 17. According to Kazarian, the job required a control fitter, and Gallelo, who was qualified for SG-1 in 1987 and was 29th on the out-of-work list, was given the dispatch. Likewise, the next challenged July referral, Barry Hazen (44) to Johnson Control on July 17, required a control fitter. Kazarian testified that Nazen, who was qualified for SG-2 dispatches in 1987 and was beneath Bermingham on the July out-of-work list, qualified as a control fitter and, for that reason, was given the dispatch. The next two questioned dispatches were from Santa Rosa on July 17; both Steven Singleton (45) and Lee Anderson (46) were dispatched to Brock & Blevins. Both were, according to Fred Castro, who was the dispatcher, ''off the list.'' The record establishes that both men were above Bermingham on the Santa Rosa out-of-work list (Singleton was fifth, Anderson was seventh); that Singleton was qualified for SG-3 dispatches in 1987; and that Anderson was qualified for SG-2. The next two challenged San Francisco dispatches in July were off of the out-of-work lists, Ray O'Malley (47) to Linford Air on July 13 and Ellis Perez (48) to Control Temp on July 30—both as journeymen. Both men were above Bermingham on the out-of-work list; O'Malley was qualified for SG-2 and Perez for SG-3 in 1987. Each was given the referral rather than Bermingham, according to Kazarian, as each was higher on the list. The final contested July dispatch was from Santa Rosa—Brad Barron (56) to Brock & Blevins on July 31 as a journeyman. According to Fred Castro, Barron, who was qualified for SG-2 in 1987, was 19th on the out-of-work list and above Bermingham on it.

Concerning the contested August 1987 dispatches, the initial one was from the San Rafael office for S. M. Singleton (51) to McClanahan Plumbing as a journeyman on August 17. At the time, Singleton (5th) was above Bermingham (50th) on the out-of-work list. According to Fred Castro, Singleton, who was eligible for SG-3 or lower 1987 dispatches, was referred ''off the list'' given his higher position. The next dispatch was from San Francisco on August 20—Chris Blangton (52) to University Mechanical on August 20. While he was beneath Bermingham on the out-of-work list (Bermingham was 35th, and Blangton was 61st), Blangton was dispatched, according to Kazarian, as a contractual ''rehire,'' having originally been referred to the signatory contractor on July 29. Also, he was eligible for SG-1 dispatches in 1987. The third challenged dispatch was from San Rafael for Lee Anderson (55) to Morrill & Co. on August 24 as a journeyman. Anderson, whose July Santa Rosa dispatch apparently lasted fewer than 10 days, retained his seventh position on the out-of-work list in San Rafael and was dispatched ''off the list.'' The final two contested August dispatches were from San Francisco. Clyde Sumpter (53) was sent to McClanahan Plumbing on August 31, and, on the same day, Al Baskin (54) was referred to Spencer & Son. Sumpter, who was fourth on the August list, worked less than 10 days for Amos and Andrews in July and, therefore, retained his position on the out-of-work list, and Baskin was seventh on that list. Notwithstanding the eligibility of each for only SG-3 dispatches then, each, rather than Bermingham, received his referral, presumably based on his higher position on the out-of-work list.

Concerning the challenged dispatches for September 1987, the initial three such were from San Francisco. On September 2, Bob Wall (57) was referred to Spencer & Son as a journeyman. At the time, he was 5th on Respondent's out-of-work list; while Bermingham was 32d. Wall, who was eligible for SG-2 dispatches, went, according to Kazarian, ''off the list,'' with a higher position than the Charging Party. The next two individuals were referred to Spencer & Son on September 14: Rich McClain (60) was a named referral and Ellis Perez (59) went with him ''off the list.'' The record reflects that Perez was 10th on the out-of-work list and was eligible for SG-3 dispatches; McClain, who was 63d on the list and, thus, beneath Bermingham, qualified for membership in SG-1 in 1987. The next contested dispatch was from the Santa Rosa office for A. G. Van Dyke (61) to Scott Broadway as a journeyman on September 16. Van Dyke, who was eligible for SG-3 dispatches, was first on that office's out-of-work list. Bermingham was 50th on the list, and, given his position, Van Dyke received the referral. The next assertedly unlawful referral was given to Jerry Bartok (62) for McClanahan Plumbing on September 21 from San Rafael. Fred Castro, who was the dispatcher, testified that Bartok, who was eligible for SG-2 dispatches, was beneath Bermingham on that office's out-of-work list (Bartok was 13th and Bermingham, 4th), but was called ''by name'' by the contractor. Castro further testified that the August 17 dispatch of S. M. Singleton to the contractor constituted the ''off the list'' portion of the referrals. The next challenged referral that month was to Chris Reyes (63), who was dis-

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ized'' work, requiring advanced training and that the individuals who perform the work install the pneumatic controls and thermostats which operate building boilers. Art. II, sec. 16(c) of the MLA permits dispatch requests for individuals who possess specialized skills, with referrals being in the order in which their names appear on the out-of-work lists, and dispatchers are given discretion in determining which applicants are qualified for the work. Kazarian testified that journeymen, with normal steamfitter skills and training, ''would be totally lost'' on such jobs—''It's like apples and oranges.'' Springer and Kazarian each testified that he keeps a list of those able to perform ''control'' work and that, when such applicants register on the out-of-work list, the letters ''CONT'' are placed next to said names. According to Kazarian, when calls are made by contractors for such workers, he skips over names on the out-of-work list until he finds those with the above notation.

Bermingham, who was never designated as able to do control fitting work, agreed that the above procedure is utilized but stated that he was qualified to perform such work and so informed Kazarian. He denied that the work was specialized, saying such fell within ''the basic knowledge'' of the steamfitter. While saying that he had told Kazarian that he could do ''control'' work, Bermingham conceded that ''I never really expressed that much desire to do control work because I wanted to be dispatched as a steamfitter. ''Moreover, Bermingham's ability to perform control fitting work is doubtful. Thus, Bermingham requested that Kazarian dispatch him to a ''control'' job in December 1988; Kazarian agreed but told the Charging Party that it was a troubleshooting job, something that he had never asked for in the past. According to Bermingham, when he reported for the job, he was asked if he could perform control work. He replied that he had not done any control work since 1978 and would have to learn the work. Bermingham was told ''we need someone actually who can handle these new systems now'' and was not hired. The contractor later wrote to Kazarian, explaining that Bermingham had neither the experience nor was qualified to work with electronic controls and other such systems.

patched to Spencer & Son on September 25 from the San Francisco hiring hall. Kazarian testified that, on that date, Reyes was sixth on the out-of-work list, and, thus, his name was above that of Bermingham. The business agent stated that Reyes, who was eligible for SG-2 dispatches, was referred based on his position on the list. Two challenged referrals were from the San Rafael hiring hall on September 28: Jack Goolsby (65) to the San Quentin Prison[34] and Frank Smith (68) to Freethy Co. According to Fred Castro, Goolsby, who was eligible for SG-2 dispatches, was below Bermingham on the out-of-work list (Goolsby was seventh) but was called by name. Castro testified that Goolsby had previously been cleared for work at San Quentin. Smith, Castro further testified, was also below Bermingham on the list (he was 26th and eligible for SG-2); however, the job was to be of short duration, and Castro could not reach anyone, including Bermingham, above Smith on the list. The next disputed September dispatch was from Santa Rosa to Herman Molencupp (67) for Scott Broadway Company on September 28. Ray Springer testified that Molencupp, who was eligible for SG-2 dispatches, was above Bermingham on that office's out-of-work list as sixth and was given the referral ''off the list'' based on his higher position. The final disputed September dispatch was from Respondent's San Francisco office: Ellis Perez (64) to McClanahan Plumbing on September 30. Kazarian testified that Perez, who had been dispatched earlier in the month, worked no more than 10 days, and, thus, did not lose his position on the out-of-work list, was given the referral because he was above Bermingham on said list.

As to the allegedly unlawful job referrals during October 1987, the initial one was from Respondent's San Francisco office for Allen Lucero (69) to Hopkins Mechanical on October 5. The record establishes that the contractor's request was for a ''control'' job and that Lucero, who was eligible for SG-3 dispatches in 1987, had the word ''control'' written above his name on the October San Francisco steamfitters out-of-work list. Although Kazarian stated that Lucero, who was beneath Bermingham on the out-of-work list (the individual was 48th; while Bermingham was 25th), was a control fitter but did not give that as the rationale, it appears that the referral required one qualified to do ''control'' work. On October 9, Hank Woodward (70) was referred from the San Francisco hiring hall to EMDE Kinetics as a foreman. The record discloses that he was eligible for SG-1 dispatches at that time and was beneath Bermingham (66th) on the out-of-work list. According to Kazarian, ''This is a rehire. . . . Mr. Woodward worked for EMDE continuously from July 1986 until July 27, 1989. . . . They called for him.'' Presumably, then, Woodward was hired pursuant to the contractual privilege accorded a contractor to request an individual as a key man, a foreman. Likewise, the next disputed referral was from San Francisco—given to Jack Lewkowitz (71) on October 13 for Bay Cities Mechanical as a foreman. As of that date, Lewkowitz, who was eligible for SG-2 dispatches in 1987, was located beneath Bermingham (47th) on the out-of-work list, and, according to Kazarian, ''he went as a foreman'' and ''they called for [him].'' The next challenged October dispatch was from Santa Rosa to David Souza (72) on October 12 for Scott Broadway Co. as a journeyman. Souza, who was eligible for SG-2 referrals in 1987 was ranked 21st on the Santa Rosa out-of-work list; while Bermingham was below him at 39th. Springer's explanation is that Souza went off the list as he was higher on it than the Charging Party. The next three disputed referrals were from the San Francisco office to individuals whose names were higher on the out-of-work list than Bermingham, with each individual being eligible for SG-2 dispatches in 1987: Ray O'Malley (73) to Bay Cities Mechanical on October 16 (14th on the list), Jim Martinez (74) to Bay Cities Mechanical on October 16 (20th on the list), and Clarence De Louis (75) to Vann Engineering on October 19 (7th on the list). As to each, Kazarian explained that he went ''off the list.'' Another disputed October dispatch was from Santa Rosa—given to George Hount (76) for Scott Broadway Co. on October 20. Hount was higher (21st) on the out-of-work list than Bermingham, was eligible for SG-2, and was taken off the list by the contractor along with a contractually privileged named referral, B. L. Barron (77). The latter, who was eligible for SG-2 1987 dispatches, was below Bermingham on the Santa Rosa out-of-work list on October 20, the referral date. The next challenged referral was of Jerry Vieo (78) to AMALCO that month. Kazarian explained that Vieo had worked continuously for that contractor from 1986 through August 1987 and was rehired as a foreman. Another disputed October dispatch from San Francisco was that of Paul Gibson (80) to Vann Engineering on October 23 as a journeyman. Gibson, who in 1987 was only eligible for SG-3 dispatches, was fourth on the out-of-work list and was referred ''off the list,'' given his high position on it.

There is no dispute that Bermingham received a dispatch to Bay Cities Mechanical on October 26 and that he worked for said contractor until on or about November 16, the date on which he once again registered on the out-of-work list at Respondent's San Francisco office. Three allegedly unlawful dispatches to individuals below Bermingham on the out-of-work list were made during this time period: Bill Van Horn (81) to Cal Air on October 27 as a journeyman, Steve Del Grande (82) to Vann Engineering on October 29 as a journeyman, and Herman Molencupp (83) to Spencer & Son as a journeyman on October 27. Both Van Horn and Molencupp were eligible for SG-2 dispatches in 1987; while Del Grande was only eligible for SG-3 dispatches. Respondent argues that each was properly dispatched off the list and that Bermingham was not registered and working at the time. Counsel for the General Counsel and Bermingham concede that he was not registered during those days but assert that if Respondent had been following the contractual ''bumping rules'' by posting the required information and by facilitating the contractual process, he would have been able to enforce his bumping rights at a later date. However, ''they did not let me exercise my right.'' The General Counsel does not

[34] In 1967, the San Quentin State Prison was in the midst of a repiping project. In order to be eligible for work there, hiring hall applicants must undergo a screening process. In November or December 1988, according to Castro, he telephoned Bermingham about a job there, ''and that's when he told me he was not eligible and not to bother.'' Bermingham recalled the conversation, but testified that they spoke about the screening process, with Castro saying it sounded as though Bermingham did not want to work there. Bermingham asked if a 25-year-old felony conviction would disqualify him, and Castro said he could not work there with such a conviction. The record reveals that the felony conviction was for marijuana possession.

contend, or is there any record evidence, that Bermingham ever requested to bump the above three individuals, rather, what is alleged is that, by not adhering to the contract bumping procedures, Respondent made it ''more difficult'' for hiring hall users to exercise their rights under the contract.

When Bermingham registered in November, he became 66th on the San Francisco out-of-work list. On that same day, November 16, four individuals were dispatched to Bay Cities Mechanical: Mike Murphy (84), John De Maria (85), Dan Hough (86), and Ralph Becker (87). Murphy, the former metal trades department worker who was allowed to transfer his SG-1 eligibility to the building trades department, was 33d on the list; De Naria, who had SG-2 eligibility in 1987, was 26th; Hough, who would have been in SG-2, was 49th; and Becker, who was eligible for SG-2 dispatches, was 53d. Each was referred instead of Bermingham, according to Kazarian, based on their higher positions on the list. Another dispatch to Bay Cities Mechanical that day of Bill Johnson (88) is also challenged. He was 40th on the out-of-work list, and, testified Kazarian, was dispatched due to his ability to perform ''control'' work (the contractor had specified that one control fitter be referred). Finally, two dispatches from Respondent's San Rafael office to E. H. Merril at San Quentin Prison on November 16 are questioned. Phil Calderon (89) and Robert Chestnut (90) were referred, and, in November, neither name appeared on the applicable out-of-work list (Bermingham appears as 21st). Both were eligible for SG-2 dispatches, and, according to Fred Castro, Chestnut was requested and dispatched ''by name'' with Calderon accompanying him off the list. With regard to both, their names do appear on the San Rafael October out-of-work list,[35] and Calderon's referral to E. H. Merril in November is noted on that list. Dispatcher Castro offered no explanation for their names not appearing on the November out-of-work list; however, neither counsel for the General Counsel nor Bermingham base their challenges to the dispatches on this point.

With regard to December 1987, there are several allegedly unlawful referrals from Respondent's San Francisco hiring hall. The first was Robert T. McCann (92) to Bay Cities Mechanical on December 1. Bermingham was 42d on that month's steamfitter out-of-work list, and McCann's name is below that with ''control'' written above it. According to Kazarian, the job call was for a ''service'' job, and ''the word 'service' means a control job or refrigeration and either one of them are the service department.'' He added that 90 percent of control fitting is service work, repairing what had been performed during the construction phase of the work. According to him, McCann was referred based on his ability to do the requested work. The next was a December 7 dispatch of Jim Martinez (93) to Spencer & Son. Although Martinez, who was eligible for SG-2 dispatches in 1987, was beneath the Charging Party on the out-of-work list (54th), Kazarian stated that he was a contractual ''by name'' dispatch with Clarence Gouchez going off the book. The last challenged December dispatch was given to Mike Murphy (94) for Bay Cities Mechanical on December 7. Murphy, who was 25th on the out-of-work list, retained his position on it as his prior job dispatch lasted only 6 days, and, according to Kazarian, he received this referral due to his higher position on the list than Bermingham.

As to January 1988, there were four allegedly unlawful dispatches from the San Francisco hiring hall. The initial one was given to Lynn French (100) on January 11 for Service Tech Control, Inc. for this month, Bermingham was 38th on the steamfitters out-of-work list; while French's name appears near the bottom of the list. Kazarian testified that the job order required a ''control fitter'' and that French, who was eligible for SG-1 in 1988, possessed the necessary skills. Indeed, next to his name on the list is the word ''control.'' The next challenged referral was to Jess Ray (101) on January 12 for Spencer & Son. The record establishes that a father (Jess Ray Sr.) and son (Jess Ray Jr.) are members of Respondent, that both were qualified for SG-1 dispatches in 1988, that the name, Jess Ray, appears as 67th on the January out-of-work list, and that it is unclear whether said name is that of the father or of the son. In any event, after initially classifying this as a contractual rehire, Kazarian declared this referral to have been a ''by name'' call, with ''Jess Ray'' being dispatched with Ed Richards (104), who went off the list on January 18. Richards, in 1988, was eligible only for SG-3 dispatches and was fifth on the January list. Kazarian testified that Richards was given the referral based on his position on the list. The final contested dispatch was give to Surjit Sihota (102) on January 11 for Vann Engineering. In January 1988, Sihota was beneath Bermingham on the out-of-work list at 40th but was eligible for SG-1 dispatches. Kazarian explained that Sihota had been terminated on December 10 and that this was a contractual rehire situation, being within 30 days. When asked by me if the time period really was 31 days in this case, Kazarian said that the 30 days actually meant ''30 working days, exclude holidays, Saturdays and Sundays.'' After counsel for the General Counsel pointed out that the MLA merely stated ''30 days'' without elaborating,[36] Kazarian said, ''I've always dispatched a person on a recall job, I've always excluded Saturdays, Sundays or holidays. . . . It equals to about 45 days.''

Concerning the challenged February 1988 dispatches, the record establishes that all were from Respondent's San Francisco hiring hall. For said months, Bermingham's name appears as 32d on the steamfitters out-of-work list. The initial disputed dispatch was of Thomas Smith (105) to Scott Broadway Co. on February 9. He was eligible for SG-1 dispatches in 1988 and registered below Bermingham on the list at 76th. According to Kazarian, he was a contractual rehire, having worked for the contractor throughout 1987, been laid off, signed the book, and immediately rehired. The next two dispatches, Ed King (106) and Chuck Sloan (107), were to Spencer & Son on February 22, with the latter being a ''by name'' referral and King being taken ''off the list.'' At the time, both were eligible for SG-2 dispatches, with King 8th on the out-of-work list and Sloan beneath Bermingham, at 66th. The next contested dispatch was given to Harry Will (108) for Vann Engineering on February 23. Will, whose name appears below that of Bermingham on the list at 46th

[35] Calderon was second and Chestnut, ninth.

[36] MLA art. II, sec. 16(b) speaks in terms of requests for individuals either laid off or terminated within ''thirty (30) days prior to the request'' and states that said individuals must have worked for the requesting contractor in excess of ''one hundred twenty (120) working days'' during the preceding 12 months.

and who was eligible for SG-2 dispatches in 1988, was dispatched, according to Kazarian, as a foreman pursuant to the MLA ''key man'' provision.

With regard to the disputed March 1988 referrals, the record reveals that Bermingham was 25th on Respondent's San Francisco out-of-work list that month. The initial disputed March dispatch was given to Barry Hazen (109), who was eligible for SG-2 dispatches in 1988, on March 1 for Spencer & Son. Kazarian states that this was a ''by name'' call for Hazen, who was beneath Bermingham on the list at 36th, and that Larry Becker went with him off the list. Bermingham asserts that Hazen was not at the San Francisco hiring hall that day and that, to his knowledge, Hazen's name was never called by Kazarian. The next disputed referral was of Pam Bates (112) to Spencer & Son on March 14. The record reveals that Bates was eligible for SG-2 dispatches in 1988 and that she registered on Respondent's out-of-work list for March at 74th. Kazarian testified that contractors often must abide by Federal and state regulations as to the hiring of minorities on projects and, at prejob conferences, Respondent is informed of the contractors' needs. Therefore, although not mandated by the MLA hiring hall rules and regulations, according to Kazarian, inasmuch as very few minorities and women utilize Respondent's hiring hall, requests for them are treated in the same manner as by-name requests, with an available, qualified woman being dispatched without regard for her position on the list. On this particular project, Kazarian testified, the contractor and the owner had agreed that a certain percentage of minorities and women would be used. He added that, when the job order came in, ''we had no women on the out-of-work list'' and when Bates came in, she received an immediate dispatch. Kazarian further testified that the dispatch of Bates was treated as a by-name dispatch with Bill Kelley (114) going to the same contractor on the same date off the list. Concerning the latter, he was eligible for no higher than SG-3 dispatches at that time but was fourth on the out-of-work list. As to Bates, Bermingham argues that, notwithstanding that she had not been registered on the out-of-work list for the required 3 working days (''I'm saying she came walking in that day . . . signed the list and was name called''), she was given a by-name dispatch. Indeed, MLA article II, section 16(e)(1) permits by-name calls provided that the individual has been registered no less than 3 working days on the out-of-work list, and analysis of the San Francisco March list discloses that Bates registered on March 14, the day of her dispatch. Taking a contrary position, Kazarian asserted that waiting for 3 days would have accomplished nothing inasmuch as the contractor, who needed a woman immediately, would have hired one off the street. As to Kelley, Bermingham points out that he was eligible for no more than SG-3 dispatches and, even assuming the validity of the merger of the two higher seniority groups,[37] he should have received the dispatch over Kelley. Also receiving a dispatch to Spencer & Son on March 14 was Frank Ditreo (113). According to Kazarian, Ditreo, who was eligible only for SG-3 or lower dispatches at the time, was second on the out-of-work list and, given his position, was referred to the contractor off the list along with a named dispatch, Chuck Michevich. Pointing to Ditreo's seniority group status, Bermingham contends that no other individuals were present in the hiring hall that day besides Ditreo and himself; ''I was right there. Had he not got the dispatch, it would have been going out to me.'' Finally, two disputed referrals (Mike Estrada (115) and Odis Gray (116)) were made to Merelick Mechanical on March 30. Gray, who was eligible for SG-1 dispatches in 1988, was 70th on the San Francisco out-of-work list but, testified Kazarian, was a ''by name'' referral. The business agent added that Estrada, who was eligible only for SG-3 dispatches, was first on the out-of-work list and referred along with Gray.

As to the remaining challenged 1988 referrals, the first is a San Francisco dispatch given to Jess Ray (120) for Spencer & Son on July 7. Although it is unclear if the individual is the father or the son, he was registered on the out-of-work list as 85th at a time when Bermingham was 12th on the list. According to Jim Kazarian, ''Jess Ray is a rehire,'' having been dispatched to the contractor on June 30. The next allegedly unlawful dispatch was of Bill Beatty (121) to Spencer & Son on August 1. Bermingham was 11th on the San Francisco August out-of-work list; while Beatty was 62d. Kazarian stated that the latter, who is black, had been a minority hire by the contractor and that the instant dispatch was a contractual rehire. The next disputed referral was of Kenneth Diaz (122) to Linford Air on August 15 as a foreman. Diaz, according to Kazarian, is not a member of Respondent; an out-of-town contractor, such as Linford Air, ''reserves the right'' to ''bring in their own foremen in each classification.'' He added that Diaz had been an employee of the contractor. Article II, section 19 of the MLA, in fact, grants to out-of-town contractors the aforementioned privilege. A challenged dispatch was given to Jack Mingram (123) to Spencer & Son on September 27. On the San Francisco September out-of-work list, Bermingham appears 13th with Mingram beneath him at 82d. Mingram was eligible for SG-2 dispatches in 1988 and was given this one, according to Kazarian, as it was a requested rehire referral. Thus, Kazarian testified that Mingram had worked for the contractor since March, registering on the list on September 9. The final contested 1988 dispatch was from San Rafael and was given to Paul Gibson (126) on October 17 for Southwest; the record is not, at all, clear on the circumstances. Thus, the San Rafael steamfitters out-of-work list for October 1988 has Gibson's name above that of Bermingham; however, Fred Castro, the dispatcher, testified that Bermingham was ''number one and then Paul's number 3.''[38] In any event, Castro further testified, without contradiction, that the work order was for a ''tube fitter,'' an individual who works on pneumatic tubing; that said work is covered under a separate collective-bargaining agreement; that he considers the work to be a ''specialty call''; and that Gibson was the only individual, then on the out-of-work list, who was experienced in

[37] Pointing to the ''underlying economic conditions'' which necessitated the suspension of the seniority group hours of work requirement in September 1986, Respondent's counsel, while conceding that seniority groups lower than SG-1 and SG-2 were not named in G.C. Exh. 4, argues that, as a result of the merger, an individual was only required to have worked 1 hour under the terms and conditions of the MLA in order to be qualified for SG-1 dispatches.

[38] The referral itself is noted on the San Francisco October 1988 out-of-work list next to Gibson's name, and the name does appear below that of Bermingham—they were not, however, first and third on that list.

such work. In any event, Gibson was eligible for no more than SG-3 referrals in 1988.

The complaint alleges, and there is no dispute that, on July 5, 1988, Bermingham made a written request to Respondent for the following information: (a) all the written requests from contractors for all plumbers, pipefitters, steamfitters, and refrigeration fitters who have been laid off or terminated by the contractor within 30 days prior to the request; (b) dispatch slips for all apprentices, steamfitters, welders, pipefitters, plumbers, and refrigeration fitters for April, May, and June 1988; (c) out-of-work lists for all [of the above job classifications] from all dispatch locations covered by Local 38 for April, May, and June 1988; and (d) written requests from contractors for all people that were dispatched by-name call or because of special skills in the months of (January through June 1988). There is also no dispute, and Respondent admits, that, by letter dated July 27, it denied Bermingham's request. Bermingham testified that the information in part (a) was requested because he did not believe that contractors were, in fact, making requests for rehires; that he requested the information in part (b) in order to verify the information on the out-of-work lists: that he requested the records in part (c) to verify that the dispatch slips are accurate and that people were referred in the proper order; and that he requested the material in part (d) to ensure that written requests were, in fact, made. He further testified that, at the time of the requests, unfair labor practice charges were pending before the Board and contractual grievances had been filed—all involving allegations related to the requested information. Other than terming Bermingham's requests as burdensome, counsel for Respondent offered no evidence as to the rejection of Bermingham's request.

The complaint in Case 20–CB–8025 alleges that Respondent unlawfully removed the Charging Party's name from its out-of-work list subsequent to the close of the initial hearing in these matters, and the basic fact is not in dispute. Thus, Business Agent Fred Castro, who has acted as the dispatcher for Respondent's San Rafael hiring hall facility since March 1, 1989, admitted that Bermingham, who was first on the November 1988 through May 1989 steamfitter out-of-work lists at said location, along with ''several'' others, was removed from the list for June 1989. What is in dispute is whether Bermingham followed the procedure for registering for the June out-of-work list by telephoning Castro in May. In this regard, Bermingham testified that his usual procedure is to telephone the San Rafael facility each month, speak to Castro, and say ''this is Ed Bermingham and I'm checking in.'' By doing so, according to him, he registers for the following month's out-of-work list, and Castro corroborated the Charging Party that such is the latter's practice. However, while Bermingham maintained that he telephoned the San Rafael's office on either May 13, 14, or 15 and spoke to Castro (saying ''This is Ed Bermingham checking in''), the latter denied receiving such a phone call and, according to him, for that reason only, removed Bermingham's name from the June list.

There is also no dispute that Castro failed to notify Bermingham that his name had been dropped from the June out-of-work list. The business agent testified that his practice is not to notify applicants of their removal from the list and that he merely notes the fact on the list. Bermingham testified that he first learned that his name no longer was on the San Rafael out-of-work list when, adhering to his normal practice, he telephoned that office in June and spoke to Castro. After registering for the July list as he had done in previous months, Bermingham asked ''where am I at on the list, and he says you're not on the list, I took you off. You haven't checked in for a month or so . . . and I . . . started . . . to complain and he hung up on me.'' Castro corroborated the Charging Party on this conversation. As evidence that Respondent continued to harbor unlawful animus against him and that Castro unlawfully removed his name from the June list, Bermingham offered the testimony of Jerad Hotchkiss, who stated that he accompanied the Charging Party to the San Rafael office in October 1989 in order to examine the out-of-work list and that when Bermingham made such a request to Castro, the latter cursed and ''he says you're not going to see the list.''

B. *Analysis*

It is initially alleged that, since January 1, 1987, Respondent has operated its exclusive hiring hall in a manner inconsistent with, and has failed to adhere to, the rules and procedures for such as set forth in article II of the existing MLA and, thereby, has engaged in conduct violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act. Board law in this area is unmistakable and of longstanding validity—any departure from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users, and violates the above sections of the Act unless the labor organization demonstrates that its interference with employment ''was necessary to the effective performance of its representative function.'' *Painters Local 1140 (Harmon Contract)*, 292 NLRB 723 (1989); *Iron Workers Local 505 (Snelson-Anvil)*, 275 NLRB 1113, 1114 (1985); *Operating Engineers Local 406 (Ford Construction)*, 262 NLRB 50, 51 (1982); *Electrical Workers IBEW Local 592 (United Engineers)*, 223 NLRB 899, 901 (1976); *Asbestos Workers Local 22 (Rosendahl)*, 212 NLRB 913 (1974). Analysis of the record discloses that the above allegation has two aspects. The first involves the series of modifications of the contractual hiring hall rules and regulations, including the suspension of the hours of work requirements for seniority groups 1 and 2, the suspension of the 120-working-day requirement in the provision permitting signatory contractors to make written requests for individuals who have been laid off within 30 days prior to said request, and the increase from 5 to 10 for the number of days an employee would have to work before losing his position on the out-of-work list, agreed on by Respondent and the signatory multiemployer associations on or about September 11, 1986. There is no dispute that the modifications were each implemented by Respondent shortly after agreement was reached.[39]

[39] Respondent alleged as an affirmative defense that the changes here are barred by the 10(b) statute of limitations. The charge in Case 20–CB–7279 was served on Respondent on May 27, 1988; therefore, the 6-month statute of limitations period commenced on November 27, 1966. While the record establishes that Respondent implemented the hiring hall rules modifications shortly after September 11, 1986, as will be discussed infra, Bermingham was not afforded notice of these changes until sometime in 1988. Moreover,

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Counsel for the General Counsel questions neither the validity of nor the necessity for the above-described modifications. Rather, he apparently argues that Respondent unlawfully implemented these, having ''failed to make a good-faith effort to give [adequate] notice of the hiring hall rules changes'' to the users of the hiring hall, including the Charging Party. As above, Board law on this point is clear and unambiguous: a labor organization's ''failure to give timely notice of substantial changes in its referral procedures [is] arbitrary and in breach of its duty to keep applicants informed about matters critical to their employment status.'' *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 904 fn. 16 (1985); *Electrical Workers IBEW Local 11 (Los Angeles NECA)*, 270 NLRB 424, 426 (1984); *Operating Engineers Local 406*, supra at 51. Counsel for Respondent asserts that the necessity for notice is merely a ''technical'' requirement and that where, as herein, there is no contention that the hiring hall changes are themselves unlawful or for an unlawful purpose, ''a lower level of notice is required.'' Counsel cites two decisions of the Board in support of his assertion; however, neither appears to fully support the assertion of counsel. Thus, *Plumbers Local 520 (Avcock Inc.)*, 282 NLRB 1228 (1987), involves the appointment of a steward and the bypassing of an individual on an out-of-work list. Notice apparently was not at issue. Further, while notice of a change in hiring hall procedures was at issue in *IBEW, Local 592*, supra, the administrative law judge merely concluded that the individual involved ''knew, or should have known'' that eligibility for dispatch required the passing of a journeyman examination notwithstanding that the applicable collective-bargaining agreement contained no such requirement.[40] The judge added that ''the document was adequate to place job applicants on notice.'' of the changed dispatching requirement; however, nowhere in his decision did the judge suggest that a ''lower level'' of notice might be sufficient in circumstances where the hiring hall rules change appears to be necessary or lawful. To the contrary, the above-cited decisions, all of which were issued by the Board subsequently to *IBEW, Local 592*, emphasize that the necessity for adequate notice of changes in hiring hall procedures is a critical aspect of a labor organization's duty to keep all job applicants informed about matters critical to their employment status, the import of which may not be lessened by the necessity for the rules change.

The issue herein, therefore, concerns the adequacy of the notice of the hiring hall rules modifications which was afforded to the users of Respondent's hiring hall. Recently, the Board adopted the following test to gauge the sufficiency of such notice: whether the labor organization ''make[s] a good-faith effort to give timely notice of the rule change in a manner reasonably calculated to reach all those who [use] the exclusive hiring hall.'' *Plumbers Local 230*, 293 NLRB 315 (1989). Several factors convince me that, while Respondent may have acted in good faith, notice of the rules modifications was *not* given in a ''manner reasonably calculated'' to reach all the users of its hiring hall. In this regard, I note that the contractual hiring hall rules and procedures are posted at Respondent's hiring hall facilities, that Respondent failed to post copies of either General Counsel's Exhibit 4 or Exhibit 5, and that Respondent offered no explanation for its failure to do so. In such circumstances, as pointed out by counsel for the General Counsel, hiring hall users might logically conclude that the posted rules and procedures remained applicable. Respondent's manner of informing users of the modifications was only to orally inform those who wished to register on the out-of-work list; however, both Jim Kazarian and Raymond Springer conceded, despite their best efforts, that they may not have informed all applicants. Further, Fred Castro offered no testimony on this point, and Greg Speranza, who, during 1987, shared the San Francisco facility dispatching duties with Kazarian and, presumably, responsibility for informing applicants of the modifications, did not testify. No other steps were taken to give notice of the modifications to the users of the hiring hall. Moreover, neither Philip Livingston, who was uncontroverted in this regard, nor Ed Bermingham was told of the changes, and, notwithstanding Respondent's assertion that he must have known the latter is credited as to becoming aware of the nature of the hiring hall rules changes until 1988.[41] In sum, it appears that Respondent's efforts at affording notice of the rules modifications to its hiring hall users were as slipshod and haphazard as those of the labor organization in *Plumbers Local 230* and that, therefore, such failure to adequately notify job applicants prior to implementing said modifications was violative of Section 8(b)(1)(A) and (2) of the Act. *Plumbers Local 230*, supra; *Teamsters Local 519*, supra. Further, in light of the foregoing, it logically follows that Respondent's implementation of the contractual hiring hall rules modifications so as to adversely affect users of the hiring hall was likewise violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act. *Plumbers Local 230*, supra. Accordingly, I conclude that the resultant merging of the contractually established seniority groups, the maintenance of unified monthly steamfitter out-of-work lists, and any job dispatches, off of said lists, which were made without regard to nominal se-

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the record establishes that hiring hall users, who were on long-term jobs in 1986, may not have received notice of the rules changes until they returned to the hiring hall in 1987, if at all. In these circumstances, as the 10(b) statute of limitations does not commence until notice of the unfair labor practice is received by the affected individual or individuals, I find Respondent's affirmative defense without merit. *Truck & Dock Services*, 272 NLRB 592, 593 (1984).

[40] Such knowledge was inferred from the wording of a referral registration form which the applicant was required to read and complete. *IBEW Local 592*, supra at 902.

[41] Kazarian contradicted Bermingham on this point, asserting that he told the Charging Party of the merger of seniority groups 1 and 2 in early 1987. However, Kazarian was impeached by his pretrial affidavit in which he stated that he never specifically told Bermingham that the seniority groups had been merged. Both Kazarian and Bermingham impressed me as being honest and candid witnesses; however, as between them, based solely on the demeanor of each while testifying, I found the Charging Party to have been the more reliable witness. Accordingly, whenever they conflict, I shall credit Bermingham over Kazarian. Therefore, I credit the Charging Party's denial of knowledge, during 1987, of the merger of the seniority groups.

In his brief, counsel for Respondent argues that, based on his stated knowledge of the contract and his many grievances, the Charging Party must have been aware of the merger of the seniority groups. However, such is no more than speculation and supposition. There is no credible evidence that Kazarian or any other business agent or official of Respondent orally informed Bermingham of the hiring hall rules modifications until 1988, and I believe Bermingham was candid, that he had no such knowledge until then.

niority group placement and which, thereby, resulted in lost employment opportunities for applicants who would otherwise have been entitled to receive the referrals according to the posted hiring hall procedures, were arbitrary and inherently discriminatory acts. Ibid.

The second aspect of the allegation that Respondent has unlawfully operated its hiring hall in a manner inconsistent with the contractually established rules and procedures concerns several provisions of the MLA to which Respondent adversely has failed to adhere. In this regard, it is undisputed that, having merged the contractual seniority groups subsequent to the execution of General Counsel's Exhibit 4, Respondent apparently felt no longer obligated to adhere to the key men, men terminated within 30 days, and right-to-hire-by-name provisions of article II, section 16 of the MLA. Thus, while the key men provision prohibited the dispatching of SG-2 members as long as SG-4 members, with the requisite foreman experience, were available on the out-of-work list and the other two provisions restricted requests, pursuant to their terms, to members of SG-1, Kazarian's only explanation for Respondent's failure to adhere to these provisions of the MLA was that the suspension of the hours of work requirement and the resultant seniority group merger made strict adherence to these provisions unnecessary. However, I have concluded that the lack of requisite notice rendered implementation of the suspension of the 1000 hours of work requirement unlawful. Further, Respondent clearly has demonstrated no compelling necessity for failing to comply with the seniority requirements in the above contractual provisions. Accordingly, its departure from said hiring hall procedures in permitting the dispatching of SG-2 or lower members to key men positions when experienced SG-1 individuals may have been available[42] and in dispatching individuals eligible for SG-2 or lower pursuant to the men terminated within 30 days and right-to-hire-by-name provisions constitutes arbitrary and inherently discriminatory conduct. Also, with regard to the men terminated within 30 days and right-to-hire-by-name provisions, the record establishes that, as to the former, Kazarian interpreted it as meaning 30 working days, did not include Saturdays, Sundays, or holidays for computing the time period, and stated such has always been his practice while acting as a dispatcher and that, as to the latter, despite its wording, which requires the off-the-list referral to be on the employer's payroll prior to the dispatch of the named individual, the dispatchers' standard practice has been to fill both positions on the day the work order is received inasmuch as, in Kazarian's view, strict adherence to the contract would be impractical. Agreeing with counsel for the General Counsel, I note that elsewhere in the men terminated within 30 days provision, the time of employment by the contractor during the preceding 12 months is specified as 120 ''working days,'' indicating that the contracting parties would have stated the time period as 30 working days if they had so intended. Therefore, the fact that the time period merely reads ''within thirty (30) days'' establishes that the parties mean 30 calendar days, and I so find. Accordingly, Respondent's dispatchers were, and are, not strictly adhering to article II, section 16(b), and the fact that Respondent may have acted in accord with its past practice is not a valid defense. *Iron Workers Local 505*, supra. As to Respondent's admitted practice of dispatching both off-the-list and named referrals at the same time in clear contravention of article II, section 16(e) of the MLA, Respondent offered no evidence justifying such a departure from its contractual hiring hall rules as necessary to the effective performance of its representative function. Rather, expedience appears to have been the underlying rationale, and such does not constitute a defense to failing to strictly adhere to contractual hiring hall procedures. Finally, the record evidence is undisputed that Respondent has failed, and is failing, to enforce article II, section 25 of the MLA, the so-called bumping provision. At the hearing, counsel for Respondent asserted that said clause was unlawful and that Respondent has never enforced the provision, including the necessity of posting a list of persons who are currently employed and who are lower than SG-1. While Kazarian testified that he has never permitted section 25 to be utilized in order to remove an employee from a jobsite, I credit Bermingham that the business agent told him in February 1987, that he (Bermingham) had bumping seniority over another individual[43] and find that Respondent, at all times herein, has recognized the viability of the bumping procedures. Moreover, Respondent cited no Board decisions holding similar clauses unlawful; contractual bumping provisions are common in many industries; and the language of section 25 has been included in the MLA for many years, with Respondent never negotiating its removal. Further, as above, the fact that Respondent's past practice may have been to refuse to enforce the bumping provision does not warrant a departure from established contractual rules which require, at the least, the posting of the aforementioned list. Accordingly, Respondent's failure to abide by the above provisions of the MLA was—and is—unlawful, violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act. *Painters Local 1140*, supra; *Iron Workers Local 505*, supra; *Operating Engineers Local 406*, supra; *Plumbers Local 392 (Kaiser Engineers)*, 252 NLRB 417, 419 (1980).

Besides the allegation that Respondent has been operating its hiring hall in a manner inconsistent with the provisions of the MLA, it is alleged that, since May 28, 1987, Respondent has discriminated against Ed Bermingham because he filed unfair labor practice charges against Respondent with the Board and engaged in other activities protected by Section 7 of the Act. The record establishes that, during 1987 and 1988, the Charging Party persistently complained about perceived violations of the contractual dispatch, hiring, and layoff provisions by both Respondent and signatory contractors, filing, at least, eight contractual grievances against former employers, several internal union grievances, and no less than 10 unfair labor practices with the Board. There is ample record evidence that Respondent, indeed, harbored animus against Bermingham as a result of his activities. Thus, it was uncontroverted that, shortly after giving a dispatch to Bermingham in October 1987, Kazarian remarked to a member of the local, ''That son of a bitch has charges

[42] For the dispatch of an individual, who is only eligible for SG-2 or lower, to a foreman position to be justified under the MLA, there must be no SG-2 member, who has key man experience, eligible for the dispatch.

[43] I do not rely on Kazarian's version of the conversation, noting that his testimony was contradicted by his pretrial affidavit wherein he admitted telling Bermingham that he did have the right to bump employees who were in lower seniority groups.

against me and I've got to give him a job.'' Further, in February 1988, Bermingham spoke to Business Agent and Santa Rosa dispatcher Ray Springer regarding retaining his position on that office's out-of-work list,[44] and, during the conversation, Springer told the Charging Party ''that because of the commotion you've been causing down at the Union you're going to have to come in and sign the list.''[45] Further, during a subsequent telephone conversation with Business Agent Fred Castro, the San Rafael dispatcher,[46] the latter accused Bermingham of being ''Melvin Belli'' and asked whom he would sue next. When Bermingham said that he was undecided, Castro replied, ''Eddie, you're going to starve to death doing that.'' Finally, clearly demonstrative of the breadth of Respondent's animus toward Bermingham, are the comments of Joseph Mazzola as expressed in a September 6, 1988 letter to Respondent's building trades department members wherein he denounced Bermingham as ''determined to smear the reputation of [Respondent] and its officers and . . . to completely destroy [it]'' by the filing of the instant unfair labor practice charges and added that the actions were nothing more than ''maliciously intended.''

In light of Respondent's unlawful implementation of the hiring hall rules modifications (specifically, the merger of the contractually established seniority groups and dispatching of applicants without regard to their seniority placement) and failure to strictly adhere to the dispatching provisions of the MLA and, since May 28, 1987, of its patently unlawful animus toward Bermingham, I turn to consideration of the approximately 125 instances, during 1987 and 1988, when, according to counsel for the General Counsel and Bermingham, job applicants with lower seniority than the Charging Party received dispatches to available jobs rather than he, notwithstanding his asserted higher seniority and availability for such work. At the outset, counsel and Bermingham assert that the record conclusively demonstrates that Bermingham was eligible for SG-1 in 1987 and 1988 and that, therefore, he should have been dispatched prior to any members of lower seniority groups. On the other hand, counsel for Respondent argues that, had the contractual seniority groups been maintained rather than merged, Bermingham only would have been eligible for inclusion in SG-2 and dispatched accordingly. In this regard, there is no dispute that the Charging Party physically worked a total of 1064 hours in 1985 and 957.5 hours in 1986; that, for purposes of wages, he was credited with having worked 1,005.95 hours; and that, for purposes of employer contributions on his behalf, to the contractual fringe benefit trust funds, he was credited, by the trust fund administrator, for just his actual hours of work—957.5 hours. Respondent further argues that its determination that Bermingham would have been eligible only for SG-2 in 1987 was based on an analysis of his trust funds credited hours by the administrator, that the administrator's analysis was done in the normal course of his job duties, and that such reliance was a ''reasonable'' interpretation of article II, section 14(f) of the MLA. As set forth above, said provision permits a dispatcher, within his discretion whenever there exists doubt as to whether an applicant has satisfied the 1000-hour requirement, to utilize either a letter from the trust funds or the records of previous employers in order to make a determination. Counsel for the General Counsel asserts that said provision ''should be interpreted to mean the hours for which an employee was paid.'' He points out, in support, that such an interpretation would avoid possible ''unfair treatment'' of similarly situated employees. Both interpretations of the above provision are, I believe, misplaced. Thus, the instant situation is not one in which an employer has acted on an interpretation of a contract provision, the employer and the Union have equally plausible interpretations of the agreement, and the employer's allegedly unlawful conduct has a ''sound arguable basis.''[47] Rather, it is one which necessitates contract interpretation in order to properly assess which of two equally plausible views of a complex factual matrix is correct. In this regard, ''it is well settled that the Board has authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases.'' *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428 (1967); *Electrical Workers IBEW Local 11*, supra at 425–426. Extensive consideration of the MLA convinces me that the proper interpretation of ''the one thousand (1,000) hour requirement'' is that such refers to the actual number of hours of physical labor engaged in by a hiring hall applicant for signatory contractors in a given year and not whatever evidence which is relied upon by a dispatcher should reflect this. Thus, as pointed out by the health and welfare funds administrator Sullivan, whether an individual is credited with more hours than actually worked for purposes of wages or fringe benefits contributions is a function of—and dependent on—the existence of so-called multipliers in the collective-bargaining agreement under which he works. In such circumstances, accepting the interpretation of the 1000-hour requirement proposed by either counsel for the General Counsel (hours as calculated for wages) or by counsel for Respondent (hours as calculated for fringe benefits contributions) means that, notwithstanding the same number of hours of physical labor, one steamfitter may be credited with having worked 1000 hours or more and another may not be so credited, with said calculations based solely on the existence—or lack thereof—of the aforementioned contractual hours multipliers. I do not believe that the parties to the MLA intended such an anomalous result, and I so find. Pursuant to the aforementioned interpretation of the 1000-hour requirement of the MLA, inasmuch as he actually worked

[44] Bermingham and Springer gave contradictory accounts as to this conversation. Inasmuch as the former's testimonial demeanor was more impressive than that of the business agent, who did not appear to be nearly as candid, I shall credit Bermingham whenever they conflict in their respective testimony.

[45] Given Springer's practice of not requiring applicants to drive to the Santa Rosa facility each month in order to register, the placing of a more stringent requirement on Bermingham patently demonstrates Respondent's animus against him.

[46] Of all the witnesses at the hearing, Castro was the least impressive; his demeanor was that of a most disingenuous witness. Accordingly, I do not rely on any aspect of his testimony and credit Bermingham whenever they conflict.

[47] Herein, inasmuch as Respondent maintained a unified out-of-work list without regard to seniority group placement at all times material, it never acted on its position to place Bermingham in SG-2. Thus, the Board's analysis in cases such as *Atwood & Morrill Co.*, 289 NLRB 794 (1988), and *NCR Corp.*, 271 NLRB 1212 (1984), is not applicable herein.

only 957.5 hours in 1986, the Charging Party would only have been eligible for inclusion in SG-2 in 1987 and 1988.[48]

Based on the foregoing legal analysis, certain legal conclusions become manifestly certain. Initially, with regard to Respondent's unlawful implementation of the September 1986 hiring hall rules modifications, including the merger of the contractual seniority groups and the resulting dispatching of job applicants off of the out-of-work lists without regard to their seniority group status, the record evidence is clear that, since January 1, 1987, there obviously have been numerous instances, including those litigated herein involving the Charging Party, in which individuals have been dispatched to jobs at times when other job applicants, who were members of higher seniority groups and who were registered on the applicable steamfitters' out-of-work list were available for said dispatches. Given the lack of sufficient notice of the changes in the hiring hall rules and procedures, all those job applicants who were denied job dispatches in these circumstances are victims of Respondent's arbitrary and inherently discriminatory conduct and entitled to be made whole for any loss of earnings. *Plumbers Local 230*, supra; *Operating Engineers Local 406*, supra at 51 fn. 5. Likewise, as to Respondent's failure to adhere to the seniority requirements of the key men, men terminated within 30 days, right-to-hire-by-name provisions of the MLA, Respondent concedes—and the record evidence is not in dispute—that, since January 1, 1987, there undoubtedly have been numerous instances, when SG-2 or lower individuals have been dispatched to jobs pursuant to the above hiring hall regulations, other than those litigated herein involving Bermingham. As found above, the failure to adhere to the explicit terms of the MLA's hiring hall provisions was, and remains, patently unlawful. Respondent's failure to act consistent with the above provisions was arbitrary and inherently discriminatory toward, and may have adversely affected, many applicants who were eligible for SG-1 status in 1987, 1988, and 1989 and who would have been eligible to receive the dispatches. Clearly, any of said affected individuals who may have suffered a loss of earnings as a result of Respondent's actions is entitled to backpay. *Laborers Local 135 (Bechtel Corp.)*, 271 NLRB 777, 780 (1984). Also, for the above reasons, any SG-1 individual who may have been adversely affected by Respondent's unlawful failure to strictly adhere to the bumping provision of the MLA since January 1, 1987, should likewise be entitled to be made whole for any loss of earnings as a result of Respondent's conduct. Ibid.

Turning again to the disputed job referrals during 1987 and 1988 involving Ed Bermingham, and in light of my conclusions as to his proper seniority group placement during those years, he would have been eligible for dispatch to available jobs off the Respondent's monthly out-of-work lists after members of SG-1 and after those SG-2 members whose names were above that of Bermingham on the lists. Therefore, the conclusion is warranted that any of Respondent's disputed referrals, which were given ''off the list'' to any of the above applicants, rather than to Bermingham, in 1987 and 1988, were lawful.[49] Conversely, assuming that Respondent had operated its hiring hall in neither an arbitrary nor a discriminatory manner toward the Charging Party, it is manifestly certain that, given his membership in SG-2, he would have been eligible for dispatches, for which he was available, off the monthly out-of-work lists prior to any other member of SG-2, whose name on the lists was beneath that of the Charging Party, and any person, who was only eligible for SG-3 or lower. Accordingly, taking into account Respondent's failure to adhere to the hiring hall provisions of the MLA and its demonstrated unlawful animus towards the Charging Party, I also conclude that any of the disputed job referrals which were given ''off the list'' to such persons, rather than to Bermingham, in 1987 and 1988, at times when he was available for said referrals,[50] must be found violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act.[51] *Plumbers Local 230*, supra. Moreover, there are numerous instances of call-by-name referrals for SG-2 eligible applicants, whose names appear beneath that of the Charging Party on applicable out-of-work lists, at times when he was available for said dispatches.[52] Given his eligibility for them, I find said refer-

[48] Assuming Bermingham would have worked 1000 hours in 1987, given my finding as to his 1986 hours, he would have been eligible for inclusion in no higher than SG-2 in 1988.

[49] These lawful, disputed dispatches are as follows: Nos. 1, 10, 11, 12, 15, 18, 20, 26, 30, 32, 34, 41, 46, 47, 52, 55, 56, 57, 63, 67, 72, 73, 74, 75, 76, 85, 86, 87, and 106.

[50] There is no dispute that, to be eligible to receive a dispatch from Respondent's San Francisco hiring hall, an applicant must be present in the hiring hall at the time of the dispatch. With regard to the San Rafael and Santa Rosa facilities, business agent Raymond Springer testified that his practice was not to require the applicant's presence at the time of the dispatch. Fred Castro testified, at the original hearing in March, that he followed the same practice. However, Castro contradicted himself in November, stating that such was never his practice and that his practice always has been to require an applicant to be present for an ''off the list'' dispatch. Given his original corroborative testimony that an applicant's presence was not required in Santa Rosa or San Rafael, I find such was the practice at said locations at all times material herein.

With regard to Bermingham's presence at the San Francisco hiring hall on the dates noted in his diaries, I was not particularly impressed with the testimony of either the Charging Party or Kazarian on this point. Nevertheless, as between them, I believe the Charging Party was the more reliable witness and shall credit his testimony that he was present at the San Francisco facility on the days noted in his 1987 and 1988 diaries. Comparing his diary notations with the dates of allegedly unlawful dispatches to SG-3 or lower members discloses that Bermingham was not present when the following SG-3 or lower dispatches were given: Nos. 6, 8, 16, 17, 22, 36, 48, 64, 81, 82, and 83. As will be explained infra, while counsel for the General Counsel does not contend that Bermingham should have been given these dispatches, he does argue that, had Respondent followed the ''bumping'' provision of the MLA, he would have been able to bid for the jobs involved. There is a particular factual dispute as to the April 2, 1987 dispatch to Ellis Perez (24th). As to this, Bermingham's diary notation for this date has him ''at union,'' while Kazarian's assertion that the Charging Party was not present is based on hearsay. Based on my above findings, contrary to Kazarian, I conclude that Bermingham was present at the San Francisco hiring hall that day.

[51] The following are the unlawful SG-2 and SG-3 or lower dispatches: Nos. 9, 5 24, 28, 33, 40, 45, 51, 53, 54, 59, 61, 80, 104, 113, 114, and 115.

[52] These unlawful, disputed dispatches include Nos. 2, 31, 62, 65, 77, 90, 93, 99, 107, and 109.

Dispatch Nos. 65 and 90 were to the San Quentin Prison, a job for which Fred Castro testified that Bermingham said he was not

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rals violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act not only as being made in disregard of the right to call-by-name provision of the MLA but also vis-a-vis Bermingham.[53] Also, amongst the disputed dispatches is one referral, pursuant to the men terminated within 30 days provision, of an SG-2 eligible applicant, whose name appears below Bermingham's on the applicable out-of-work list (123d) and one referral, pursuant to said MLA section of an SG-3 member (22d) when Bermingham's name was on the out-of-work list and he was available for the dispatch. I have previously concluded that any such ''rehire'' referrals, in disregard of the terms of the above provision, were unlawful. Noting Respondent's animus toward the Charging Party and given his eligibility for said referrals, I further conclude that such were violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act as to Bermingham.[54] As to those disputed referrals involving dispatches to foreman positions pursuant to Section 16(a) of the MLA, notwithstanding that several were referrals of SG-2 members, these may not be found unlawful vis-a-vis Bermingham.[55] Thus, not only was he eligible for no higher than SG-2 status in 1987 and 1988 but also there exists no record evidence that no eligible SG-1 members, with the requisite foreman experience, were available for each dispatch. Accordingly, assuming Respondent had properly made the dispatches, he would not have received them. Likewise, notwithstanding Respondent's failure to abide by the contractual bumping provision, inasmuch as said section of the MLA gives bumping privileges only to ''unemployed workmen from Group 1'' and as Bermingham was not eligible for inclusion in that seniority group, the conclusion is warranted that, even had Respondent been adhering to section 25, he would not have been permitted to bump previously dispatched employees off their jobs. Accordingly, I find that none of the disputed dispatches, as to which Bermingham was assertedly denied bumping privileges, were unlawful as to him.[56]

Respondent presented evidence that certain of the disputed dispatches were for refrigeration fitters[57] or control fitters,[58] that the individuals who were referred to said jobs were eligible for, and proficient in, such work, and that Bermingham neither was interested in, nor able to perform, these jobs. As to the referrals to refrigeration fitter positions, the record establishes that refrigeration work constitutes a separate job classification and that, merely for purposes of convenience, referrals for such jobs were made off the steamfitters' out-of-work lists. Furthermore, applicants, who were dispatched to refrigeration fitter jobs, placed the notation ''REF'' next to their names, and Bermingham conceded that not only had he never performed such work but also he was not qualified to perform ''any'' aspect of it. Regarding the referrals for control fitter work, the record establishes that the MLA permits dispatching for work, which requires specialized skills, in the order in which the names of qualified individuals appear on the out-of-work lists. While Kazarian, Castro, Springer, and Bermingham conflict as to whether control fitter work requires specialized skills, based on the record as a whole, I credit the business agents on this point and conclude that control fitting work, which involves the installation and servicing of pneumatic controls and thermostats, is a specialized type of steamfitting work, one requiring advanced training. Further, while the individuals, who are dispatched for such work, normally have the designation ''CONT'' above their names on the out-of-work lists, Bermingham's name never appears in this manner, and he conceded that he never ''really expressed that much desire'' to perform such work. Moreover, while the Charging Party asserted that he was qualified to perform control fitting work, the record establishes that, on one occasion when he was dispatched for such work, the contractor refused to hire him, explaining that the Charging Party neither possessed the experience nor was qualified to work on electronic control systems. In these circumstances, notwithstanding that SG-2 persons, whose names appeared beneath Bermingham's on out-of-work lists, and SG-3 individuals received dispatches for refrigeration and control fitter jobs at times when Bermingham was available, I find that he was not qualified for either work, that Respondent did not act arbitrarily or discriminately in referring others to the available jobs, and that, accordingly, the above-disputed dispatches were not unlawful as to Bermingham.

Turning to the remainder of the disputed 1987 and 1988 dispatches, three (Nos. 27, 84, and 94) were to Mike Murphy, the individual who, in 1985, was permitted, by Respondent, to transfer from its metal trades department to its building trades department without loss of his SG-1 status. Counsel for the General Counsel argues that the treatment of

qualified and ''not to bother'' giving him dispatches. Given my prior credibility resolution, I credit Bermingham that he mentioned a 25-year-old felony conviction and Castro said he could not work at the prison with that record. Therefore, I believe Castro's failure to dispatch Bermingham to these jobs was a product of Respondent's unlawful animus and clearly unlawful.

[53] There are three instances of call-by-name referrals of individuals who were eligible only for SG-2 and whose names appeared above that of Bermingham on the applicable out-of-work lists: dispatch Nos. 13, 14, and 23. Inasmuch as it is not unreasonable to conclude that the individuals involved would have received the referrals anyway, I find that Bermingham would not have received these. However, they must be viewed as unlawful in the context of being violative of the specific terms of the call-by-name provision of the MLA.

Three of the disputed call-by-name dispatches (Nos. 60, 101, and 116) went to SG-1 members and were lawful under the MLA.

[54] Four of the disputed discharges were given, pursuant to sec. 16(b), to SG-1 members and were, thus, lawful. These were dispatches Nos. 39, 52, 105, and 120.

As to dispatch No. 102, involving Surjit Sihota, while not valid as a contractual rehire dispatch (31 days after termination notwithstanding Kazarian's assertion that only working days should be considered in the calculation, a contention I have found without merit), Sihota was an SG-1 member and, thus, eligible for the dispatch before Bermingham notwithstanding being beneath the latter on the out-of-work list. The referral was, therefore, lawful as to Bermingham.

[55] The disputed key man referrals include Nos. 3, 4, 5, 25, 35, 71, 78, and 108. As above, these may, nonetheless, be viewed as unlawful as being made in contravention of the contractual key men provision.

[56] The disputed dispatches involving the bumping of SG-2 and SG-3 individuals whose names were beneath the Charging Party on out-of-work lists include Nos. 6, 8, 16, 17, 22, 36, 48, 64, 81, 82, and 83. As the record establishes his unavailability for these referrals, each must be viewed as lawful vis-a-vis the Charging Party.

[57] The disputed dispatches given for refrigeration fitter jobs are Nos. 7, 19, 21, 29, 37, 49, 50, 58, 79, 95, 103, and 124.

[58] The disputed control fitter dispatches are Nos. 42, 43, 44, 69, 88, 92, and 100.

Murphy was contrary to the specific language of the MLA's seniority group provisions which states that eligibility for SG-1 status depends on an individual's hours of work under the terms of ''this or a predecessor'' agreement and that Respondent offered no evidence that its departure from its hiring hall rules was justified by representational necessity. Without regard to the merits of counsel's argument, it is evident that, in order to find the three disputed 1987 dispatches to have been unlawful, one must initially find that Respondent acted unlawfully and in violation of the terms of the MLA by permitting Murphy to retain his SG-1 status. In this regard, Respondent's conduct obviously occurred in excess of 6 months prior to the filing of the unfair labor practice charge in Case 20–CB–7279 and, thus, was beyond the 10(b) statute of limitations period. Unlike regarding the September 1986 hiring hall rules modifications and contrary to the assertion of counsel for the General Counsel, there exists no evidence that Bermingham did not become aware of the transfer of Murphy's seniority group status until sometime within the 10(b) period. Therefore, what occurred in 1985 is not open to challenge at this point, and one must accept Murphy's resultant SG-1 status amongst Respondent's building trades department job applicants. Thereafter, as, according to trust fund records, Murphy worked no hours in 1986 and less than 900 hours in 1987, he failed to retain this seniority group status and, in 1987 and 1988, only was eligible for inclusion in SG-2. In light of the foregoing, contrary to Kazarian, he was not eligible for rehire in May 1987 pursuant to section 16(b) of the MLA; nevertheless, dispatch No. 27 may not be considered as unlawful vis-a-vis Bermingham inasmuch as it appears that the latter was not then registered on the May 1987 San Francisco out-of-work list and as, in any event, Murphy's name was above that of Bermingham on said list. With regard to dispatch No. 84, it seems to have been given to Murphy at a time when his name appeared above that of Bermingham on the out-of-work list; given their equal seniority group status, the dispatch appears to have been lawful, and I so find. However, as to dispatch No. 94, Kazarian testified that Murphy retained his place on the out-of-work list because the prior job lasted just 6 days. The language of the MLA permits an applicant to retain his place if he works no more than 5 days. As I have found implementation of the September 11, 1986 changes unlawful and as one of these increased the above period to 10 days, it follows that Kazarian unlawfully permitted Murphy his position on the May out-of-work list. Accordingly, I find dispatch No. 94 to have been unlawful as to Bermingham, who would have been higher on the list than Murphy.

Next, with regard to disputed dispatch No. 38, Kazarian's testimony was uncontroverted that said action should not be considered as a job referral inasmuch as the applicant, Bill Durand, merely was reinstated to his previous position after being suspended due to being involved in a physical altercation on the jobsite. Notwithstanding that Durand's name was beneath that of Bermingham on the out-of-work list, it does not appear that the latter was discriminatorily passed over for dispatch, and I find this referral to have been lawful. Concerning dispatch No. 68, a San Rafael dispatch given to an SG-2 individual, whose name was beneath that of Bermingham on the September 1987 out-of-work list, in accord with my belief that business agent Fred Castro appeared to be an utterly disingenuous witness, one who would be credited at all herein, I do not rely on his explanation and conclude that, exhibiting Respondent's animus against Bermingham, Castro deliberately bypassed him on this occasion. Therefore, I find dispatch No. 68 to have been violative of Section 8(b)(1)(A) and (2) of the Act. As to dispatch No. 89, according to Castro, this was the ''off the list'' portion of a call-by-name referral. However, both dispatches were on November 16, 1987, from San Rafael and, while the names of both applicants appear on the October 1987 San Rafael out-of-work list, neither appears on the November list and Castro offered no explanation for this. Inasmuch as the MLA's hiring hall procedures specify that applicants must be registered on each monthly out-of-work list in order to receive a dispatch, it is manifestly certain that Respondent discriminated against Bermingham, who was registered on the November list, by awarding this referral to an individual who was not registered. Accordingly, the above dispatch was violative of Section 8(b)(1)(A) and (2) of the Act.[59] Regarding dispatch No. 112, given to Pam Bates on March 14, 1988, Kazarian testified that the contractor requested a woman, that requests for women and other minorities are treated as ''by name'' requests and that such are made without regard to position on the out-of-work list. Bermingham did not dispute the procedure utilized in referring minorities and women. Rather, he argued that, as the MLA permits name calls provided that the individual has been registered no less than 3 days on the out-of-work list and as Bates was dispatched immediately on registering, said referral was in violation of the contract and unlawful. Kazarian stated that Respondent attempts to cooperate with contractors, who require percentages of their work forces to be comprised of minorities and women, and that, with regard to Bates, Respondent could have waited the required 3 days but the contractor's need was immediate and she was available. In my view, Respondent clearly has demonstrated the representational necessity for not closely adhering to the hiring hall procedures when placing minorities and women. The social and political necessity for placing minorities and women in jobs which traditionally have not been open to them is of a greater import than strict obedience to contractual procedures. Therefore, I find this referral to have been lawful. Likewise, dispatch No. 121, given to Bill Beatty on August 1, 1988, when his name was beneath Bermingham's on the out-of-work list, was a minority hire and, for the above reasons, must be found lawful. Dispatch No. 122 was for a key man position. The contractor was an out-of-town employer, and the individual was an employee of the contractor but not a member of Respondent. Inasmuch as section 19 of the MLA permits such employers to utilize their own foremen, said referral seems to have been in accord with the MLA and lawful. Finally, regarding dispatch No. 126, on its face, it appears to be the dispatch of an SG-3 applicant rather than Bermingham. Fred Castro asserted that the job call was for a ''tube fitter,'' that the dispatched applicant was the only individual, who was available and experienced in the work; and that such is ''specialty'' work which is covered by a separate collective-bargaining agreement. Notwithstanding my view that Castro was basically not worthy of belief, inasmuch as Bermingham failed to controvert his testimony as to this dispatch, I shall

[59] I have previously found the by-name dispatch (No. 90) as unlawful as to Bermingham.

credit Castro in this instance. Accordingly, given the special nature of the work involved and the experience of the dispatched applicant, I do not view the referral as either arbitrary or discriminatory and find it to have been lawful.

Two allegations remain unresolved. As to the first, which involves Bermingham's July 5, 1988 written request for dispatch information, including rehire requests, dispatch slips, requests for special skills, and out-of-work lists, and Respondent's July 27 denial of the request, there exists no factual dispute. The Charging Party testified that his request was made in connection with pending unfair labor practice litigation before the Board and with pending contractual grievances. Respondent argued that Bermingham's request was burdensome; however, no evidence was offered in support of this assertion. The Board has held ''that a union has an obligation to deal fairly with an employee's request for job-referral information that an employee is entitled to access to job-referral lists in order to protect his referral rights'' and that the refusal to provide such information is violative of Section 8(b)(1)(A) of the Act. *Operating Engineers Local 825 (Building Contractors Assn.)*, 284 NLRB 188 (1987); *Teamsters Local 282 (General Contractors)*, 280 NLRB 733, 735 (1986). Herein, not only did Bermingham request to see the out-of-work lists but also he requested to see the underlying information concerning dispatches off the lists. Given his ongoing dispute with Respondent over the latter's failure to refer him to available jobs and the pending Board litigation involving his unfair labor practice charges, I believe Respondent was obligated to provide the requested information. Moreover, Respondent has failed to demonstrate that it would have been unduly burdensome for it to have complied and provided the requested documents. Accordingly, I find Respondent's denial of Bermingham's request to have been violative of Section 8(b)(1)(A) of the Act. Ibid.

As to the final allegation herein, that Respondent unlawfully removed Bermingham's name from its San Rafael hiring hall's June 1989 out-of-work list at a time when his name would have been at the top of the list, evaluation of what occurred is wholly dependent on my resolution of the credibility of the witnesses. Thus, business agent Fred Castro's justification for removing Bermingham's name from the out-of-work list is that the Charging Party failed to call the office and, thereby, register for the June list during the month of May. However, given my previously stated conclusions, that Castro appeared to be a most unimpressive witness, one lacking any candor, and that, as between them, Bermingham was the more trustworthy and honest witness, I credit the Charging Party that following his normal procedure for registering on Respondent's San Rafael out-of-work list for the next month, he placed a telephone call to that facility on either May 13, 14, or 15; that he spoke to Castro; and that Bermingham said to the business agent, ''This is Ed Bermingham checking in.'' Castro conceded that this was the normal way in which Bermingham registered for the next month. The foregoing convinces me that Castro deliberately omitted Bermingham's name from the June out-of-work list, and I am also convinced that such directly resulted from Respondent's unlawful animus against him. Thus, as demonstrated above, Respondent harbored animus against Bermingham for his activities which included the filing of unfair labor practice charges with the Board. Castro himself exhibited such animus when he warned the Charging Party in February 1988 that he (Bermingham) would starve to death by filing lawsuits. That such animus motivated Castro on this occasion is certain. Thus, when Bermingham telephoned him to complain about not being on the June list, Castro hung up on him, and, in October, when Bermingham requested to see the out-of-work list, Castro cursed and refused. In my view, the foregoing conclusively establishes that Respondent arbitrarily and discriminatorily removed Bermingham's name from its June 1989 out-of-work list in violation of Section 8(b)(1)(A) and (2) of the Act, and I so find.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. By failing to adequately notify job applicants of the modifications of its contractually established hiring hall rules and procedures (including suspension of the 1000 hours of work requirements for seniority groups 1 and 2, the suspension of the 120-working-day requirement in article II, section 16(b), and the increase from 5 to 10 for the number of days an employee would have to work before losing his position on the out-of-work list), which were agreed on by Respondent and the signatory contractors on or about September 11, 1986, and by therefore, since on or about January 1, 1987, implementing said modifications, Respondent operated its exclusive hiring hall in an arbitrary and discriminatory manner, violative of Section 8(b)(1)(A) and (2) of the Act.

3. By deviating and failing to adhere to its contractually established hiring hall rules and procedures (including the key man, men terminated within 30 days, right to hire by name, and bumping provisions), Respondent operated its exclusive hiring hall in an arbitrary and discriminatory manner, violative of Section 8(b)(1)(A) and (2) of the Act.

4. Since on or about January 1, 1987, as a result of implementing the aforementioned modifications of its contractually established hiring hall rules and regulations without adequate notice to job applicants and of deviating from the contractually established hiring hall rules and regulations, by failing and refusing to refer Ed Bermingham and other applicants to available jobs, Respondent operated its exclusive hiring hall in an arbitrary and discriminatory manner, violative of Section 8(b)(1)(A) and (2) of the Act.

5. By, since May 28, 1987, failing and refusing to dispatch Ed Bermingham to jobs for which he was eligible and available because he filed unfair labor practice charges with the Board and engaged in other protected concerted activities, Respondent operated its hiring hall in an arbitrary manner and discriminated against Bermingham in violation of Section 8(b)(1)(A) and (2) of the Act.

6. By failing and refusing to honor Bermingham's request for dispatch information in order that he could protect his referral rights, Respondent engaged in conduct violative of Section 8(b)(1)(A) of the Act.

7. By removing Bermingham's name from the June 1989 out-of-work list, Respondent engaged in arbitrary and discriminatory conduct, violative of Section 8(b)(1)(A) and (2) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

9. Unless noted above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in and is continuing to engage in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it be ordered to cease and desist from said conduct and to take certain affirmative actions which are necessary to effectuate the policies of the Act. Initially, with regard to the September 11, 1986 modifications to the MLA's hiring hall regulations and procedures, inasmuch as I have found that Respondent gave insufficient and less than adequate notice of them to the users of its hiring hall and as I, therefore, concluded that, since January 1, 1987, the implementation of the modifications, including the merger of the contractual seniority groups and failure to adhere to the seniority group provisions of the MLA for purposes of dispatching job applicants, was arbitrary and discriminatory and likewise unlawful, not only should Respondent be ordered to cease giving effect to said modifications but also, given the manifestly certain fact that ''literally hundreds, if not thousands, of . . . referrals took place within the time period framed by the applicable 10(b) dates and the date[s] of the hearing in [these proceedings]'' based on said unlawful modifications, all those applicants, who were affected by the foregoing discriminatory conduct,[60] should be made whole for any loss of earnings and benefits which they may have suffered. *Laborers Local 135*, supra at 781; *Operating Engineers Local 406*, supra at 51. Backpay should be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[61] Specifically as to Charging Party Ed Bermingham, I found that Respondent unlawfully failed and refused to dispatch him to available jobs not only, since January 1, 1987, based on the foregoing but also, since May 28, 1987, based on the instant unfair labor practice charges, which he filed with the Board and other protected concerted activities in which he engaged. As a result of such discriminatory conduct, Bermingham shall be made whole for any loss of earnings and benefits suffered in the manner set forth above.[62] Likewise, inasmuch as I have concluded that Respondent deliberately and discriminatorily omitted Bermingham's name from its San Rafael June 1989 out-of-work list, Respondent shall be ordered to make Bermingham whole for any wages and benefits he may have lost in the manner set forth above as a result of said discrimination against him. Finally, Respondent shall be ordered to post an appropriate notice.

[Recommended Order omitted from publication.]

APPENDIX II

ARTICLE II

HIRING PROCEDURE

Section 12.—QUALIFIED CRAFTSMEN.

(a) ONLY QUALIFIED CRAFTSMEN EMPLOYED. Contractors shall employ only qualified journeyman plumbers and pipe fitters.

(b) QUALIFICATIONS. Journeyman plumbers and pipe fitters shall be qualified for employment if they meet the following requirements:

(1) FOUR (4) YEARS EXPERIENCE. They must have four (4) years actual practical working experience at the plumbing or pipe fitting trade as a journeyman or apprentice in the plumbing and pipe fitting industry of the United States as evidenced by membership in a U.A. local or affidavits of employers.

(2) APPRENTICESHIP. Successful completion of an apprenticeship program in the building and construction industry at the plumbing and pipe fitting trade, approved for the trade by the United States Bureau of Apprenticeship Training, as evidenced by a state certificate, or, in the case of states which do not issue certificates, by the affidavit of an officer in charge of the apprenticeship program; or

(3) PREVIOUS EMPLOYMENT. Previous satisfactory employment as a journeyman plumber or pipe fitter with contractors signatory to this Agreement, as evidenced by written letters of recommendations from at least two such employers; and

(4) EXAMINATION. Passage of an examination given by the Joint Hiring Committee, or an individual or committee designated by the Joint Hiring Committee, or given by or pursuant to collective bargaining agreement with another U.A. Local Union, as evidenced by a membership card in such local or by affidavit from the individual or organization giving the examination.

Examinations shall consist of objective written questions and plan problems. They shall be given twice a month, upon application to the Committee. Any applicant with proof of four (4) years' experience at the plumbing and pipe fitting trade as a journeyman or apprentice in the plumbing and pipe fitting industry shall be eligible to take the examination, upon payment of a $25.00 examination fee.

An individual who fails an examination shall not again be eligible to take the examination for a period of six (6) months.

Section 13. — EXCLUSIVE HIRING.

Whenever any contractor has need to hire any employee to perform work covered by this Agreement, he shall obtain such employees through the Hiring Halls established by this Agreement. This shall include, but not be limited to journeymen, apprentices, and foremen categories. He shall notify the local union office, either in writing or by telephone, stating the location, the time, approximate duration of the job, the

[60] The precise numbers and identities of such individuals, the dates on which they should have worked, their rates of pay, and all related issues are backpay matters properly left to the compliance portion of these proceedings.

[61] Interest will be computed at the ''short-term Federal rate'' for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621.

[62] Respondent argues that Bermingham is not entitled to any backpay inasmuch as he cannot establish, as a matter of fact, that he would have been entitled to have been dispatched in any of disputed instances of dispatches which I have found unlawful as to him. Contrary to Respondent, the Board has held, in a case similar to herein involved, that, ''for purposes of finding a violation, it is irrelevant whether under the posted hiring hall procedures any other applicants would have had greater priority for referral'' and that, once the violation is found, backpay must be awarded. *Iron Workers Local 505*, supra at 1114 fn. 10.

type of work to be performed, and the number of workmen required. No Employer shall advertise in the newspaper for men without the written consent of the Joint Hiring Committee and without prior compliance with other provisions of Article II.

(a) EMPLOYER MUST PLACE ORDERS BY 9:30 A.M. Employers shall place orders for men with the Hiring Hall before 9:30 A.M. on the day preceding that on which the men are to report. If such notification is given, then an employee who reports for work after 8:00 A.M. on the following day shall be paid from the time he reports. If an Employer places an order after 9:30 A.M. for the following day and, as a result, an employee is unable to report for work by 8:00 A.M., the employee shall nevertheless be paid from 8:00 A.M. The provisions of this section shall apply to shift work as well as regular work. Day shift employees required to work after 1:00 A.M. and laid off before 8:00 A.M. shall be paid to 8:00 A.M. at overtime rates.

(b) REMEDIES FOR VIOLATION OF HIRING PROCEDURES. Violations of this Agreement by hiring employees without complying with the provisions of this Article, or by obtaining or transferring workmen in violation of Section 17 of this Article, or by assigning work covered by this Agreement to employees who are not qualified plumbers or pipe fitters shall be subject to the following remedies, in addition to others which may be available under this Agreement or as a matter of law:

(1) Upon notification by the Union that it believes such violations to have occurred, the Employer or the Union may submit the issue to the Arbitration Committee of the Joint Industry Board as provided herein; but pending decision by that Committee, the Employer shall forthwith cease employing or assigning work to the workmen in dispute. In the event the Union submits a matter to the grievance machinery provided for in this Agreement, and it is determined by the Arbitration Committee or through arbitration that the Employer, in fact, has violated the provisions of this Article, the Employer shall reimburse all employees who withheld their labor during the pendency of the dispute for all time lost and all fringe benefit contributions that would have been made had the employees continued to work during the period of such dispute. The Union may require that such payments be made before the employees will return to work.

(2) Whenever an Employer commits such a violation he shall be deemed to have caused loss of wages and fringe benefits to workmen on the Hiring Hall out-of-work lists in an amount equivalent to the amount they would have received if they had been employed on the work in question. If it is not possible to determine the individual or individuals who would have been dispatched had the Employer adhered to the provisions of the Agreement, the Arbitration Committee of the Joint Industry Board may order payment of such amount to a charity or fringe benefit program designated by the Union. If it is feasible to determine the individuals on the out-of-work list who would have received an assignment had the Employer adhered to the hiring procedures of the Agreement, the payment shall be made to the individual or individuals who would have been dispatched to the job.

(3) The remedies provided for herein shall not be affected by any other term or provision of this Agreement.

(4) A Committee shall be established to review Article II, Section 13(b)(4) for the purpose of providing a Metal Trades Shopman Classification. The Committee to review and establish:

a. Formula for wages and fringes.
b. Scope of work to be defined.
c. Penalties for violations and abuse of this classification.
d. Qualifications for employer to hire shopmen.
e. All hiring of this classification shall be through the Hiring Hall.
f. Dues checkoff to be established and included.

All employees working in this category for employers covered by this Agreement effective January 1, 1985 shall be members of Local 38.

Section 14.—SENIORITY.

It is the desire of the parties to provide continuity of employment for persons who have worked previously within the area covered by this Agreement, and in cooperation with the plumbing and pipe fitting industries of neighboring areas, to provide continuity of employment for persons who have worked in those areas as well. Therefore, qualified journeymen plumbing and pipe fitters shall be hired and/or rehired in accordance with seniority as follows:

(a) SENIORITY GROUP I shall consist of plumbers and pipe fitters who have been employed by a contractor party to this Agreement for a period of at least one thousand (1000) hours each year during the two (2) calendar years preceding the year registration is effected on the out-of-work list, and such employment has been under the terms of this or a predecessor Agreement between the Union and a contractor. In determining said one thousand (1000) hours, the dispatcher shall have recourse to the records of the Trust Fund for the two (2) calendar years preceding the year in which the dispatch occurred. In addition, if an individual has worked in another area pursuant to a reciprocity agreement that credits such hours to any of the U.A. Local 38 Trusts, such hours shall be counted in meeting the requirements of this Section. Further, in the event the individual is temporarily disabled and establishes proof that he had attained eligibility to Seniority Group I, and his failure to maintain such eligibility was solely attributable to such disability, he may be credited with such hours towards the requirements as the Joint Hiring Committee may deem appropriate with the intent that periods of disability shall be credited with a prorata of the hours worked by such individual during the period he was not disabled. For example, if an individual averaged one hundred (100) hours a month during periods he was not disabled, he may be credited with one hundred (100) hours for any month in which he was so disabled, it being the purpose of this Section to maintain his average hours during the period that a disability precluded him from employment. In no event may any hours be credited on the basis of disability if the employee had been working in gainful employment other than in work covered by this Collective Bargaining Agreement.

(b) SENIORITY GROUP II shall consist of plumbers and pipe fitters who have been employed under the terms of this or a predecessor Agreement by a contractor party to this Agreement for a period of at least one thousand (1000) hours a year in two (2) years out of five (5) years immediately pre-

ceding the year in which the registration is effected on the out-of-work list.

(c) SENIORITY GROUP III shall consist of plumbers and pipe fitters who have been employed for a period of at least one thousand (1,000) hours each year during the two (2) years preceding their registration on the out-of-work list, in the Greater Bay Area (inclusive of Santa Clara, Alameda, Contra Costa, San Joaquin, Sacramento, San Mateo and Solano Counties), and such employment has been as a plumber and pipe fitter in the Building and Construction Industry. Employees who have been employed within the jurisdiction of the contracting union as plumbers and pipe fitters in other than the Building and Construction Industry for a period of one thousand (1,000) hours each year during the two (2) years preceding their registration on the out-of-work list shall also be regarded as in Seniority Group III for such work as they are able to perform in the full discretion of the dispatcher.

(d) SENIORITY GROUP IV shall consist of all other qualified plumbers and pipe fitters.

(e) SENIORITY GROUP V shall consist of individuals who are not qualified plumbers and pipe fitters, as the term is defined in this Agreement, who have been employed by an Employer because no qualified individual in any higher seniority group was available for dispatch. An individual in this seniority group shall not advance to a higher seniority group unless and until he becomes a qualified plumber or pipe fitter as the terms are defined in this Agreement.

In the case of each group, the seniority qualifications will be deemed to have been met: (1) by any person who was available for the required employment but was denied employment because of membership or non-membership in any labor organization, other than for the failure to abide by the provisions of Sections 20 and 23 of this Article; (2) by any person who was unavailable for the required employment because of illness or because of his position as a contractor or union representative, and who worked the requisite one thousand (1,000) hours each year during the two (2) years preceding the period of unavailability.

(f) DETERMINATION BY DISPATCHER. In the event of any doubt as to whether an applicant has met the one thousand (1,000) hour requirement, the dispatcher shall have discretion to resolve the matter by accepting as final either, (a) a letter from the Health and Welfare Fund in the area in which he claims to have worked or, (b) records of previous employers.

(g) JOINT HIRING COMMITTEE POWER TO IMPOSE PENALTIES. Any individual who engages in moonlighting, working in the territorial area covered by this Agreement for a contractor not signatory to this Agreement, or any applicant who knowingly misrepresents his past experience or employment, works under this Agreement at wages and conditions less favorable than those contained herein, or who seeks employment outside the procedures of the Hiring Hall, may be suspended from the out-of-work list for a period as determined by the Joint Hiring Committee up to twelve (12) calendar months from the date of determination by the Joint Hiring Committee that such offense occurred. He may also be assessed damages for breach of the Agreement to $100.00 for each day of violation in addition to the secretarial costs for the transcript of the hearing.

If any individual fails to respond or be at the Dispatch Hall available to accept dispatches for the majority of the days in any month which the Dispatch Office is open for dispatch, and three (3) or more job offers were available for which he was qualified, and his position on the out-of-work list would have resulted in a dispatch to such jobs if he were available and had accepted, he shall be placed at the bottom of the out-of-work list.

(h) SUSPENSION FOR FAILURE TO PAY DUES OR HIRING Hall FEE. Any applicant who fails to comply with the provisions of Section 20 or Section 23 of this Agreement may be suspended from the out-of-work list for a period as determined by the Joint hiring Committee, but in no event to exceed twelve (12) calendar months.

(i) EMPLOYER PROHIBITED FROM EMPLOYING INDIVIDUALS SUSPENDED. It shall be a violation of the Agreement for any Employer to employ or retain in his employ any individual so suspended for the duration of the period of suspension.

(j) PROHIBITIONS FOR INDIVIDUALS HOLDING ACTIVE CONTRACTOR'S LICENSE. No individual who holds a contractor's license will be permitted to be dispatched pursuant to the referral process to work on work covered by this Agreement unless he submits evidence that he has made his contractor's license inactive through the procedure specified by the California Contractor's State License Board. Further, contractors who have worked as employers or self-employed persons and subsequently go out of business and desire to register pursuant to the provisions of the referral procedure shall be required as a condition precedent thereto to sign an agreement not to engage in business as a contractor for a period of one (1) year and until sixty (60) days notice is given to the Joint Industry Board of an intention to engage in contracting work and to cease utilizing the facilities of the referral procedure. In the event of a violation of this Section, any employee who is engaged in contracting work while employed by a contractor under the terms of this Agreement shall be penalized not less than one (1) month's wages and fringe benefits for each such violation.

Section 15.—HIRING HALL LOCATIONS AND DISPATCHING PROCEDURE.

(a) OUT-OF-WORK LISTS. The Union shall maintain an out-of-work list at each of the three Hiring Hall offices: San Francisco, San Rafael and Santa Rosa.

(b) APPLICATION FORM. Any individual who desires to be dispatched from the Hiring Hall must fill out an application form showing his name, address, telephone number, social security number, other information relevant to determining his qualifications to register and to obtain group seniority, and an agreement to be bound by the provisions of this Article.

(c) WORK CARD. In addition to his application form, each applicant who desires to be dispatched from the Hiring Hall must fill out a Work Card, indicating the type or types of work at which he has had experience and which he regards himself as qualified to perform. There shall be separate cards for fitters, plumbers, pipe fitter welders and refrigeration mechanics. An applicant who fills out more than one card must indicate a preference for one craft. No individual shall be permitted to regard himself as qualified to perform fitter work, plumber work, pipe fitter welding work or refrig-

eration work unless he has established a level of competence equivalent to that attained by employees working as journeymen in the particular category. This shall require experience and training equivalent to that required to attain journeyman status in the particular specialty. The individual shall indicate the precise level of experience and academic training he has to support his claim of qualifying in the specialty. The Hiring Hall Committee may establish rules and regulations for the review and testing of applicants claiming such qualifications if, in its opinion, it is desirable to do so. The Dispatcher may challenge the qualifications of an individual contending that he possesses such qualifications if, in his opinion, the evidence is insufficient to support the claim of qualification.

(d) REPORTING FOR REGISTRATION. An applicant who desires to be dispatched to a job shall report in person to register his name on the out-of-work list. In order to maintain his place on the list, he must re-register in person at least once (1) each week, unless he is unable to do so by reason of illness, in which case he shall reregister by mail.

(e) ORDER OF REGISTRATION. The Union shall establish and maintain a separate appropriate registration facility for qualified applicants available for employment as journeymen plumbers or pipe fitters. Applicants shall be registered on the appropriate craft out-of-work list, i.e., either plumber or pipe fitter, in the order of time and date of registration. Within each craft list, applicants shall be registered in the highest seniority group for which they qualify.

(f) LOSS OF PLACE ON OUT-OF-WORK LIST. So long as he re-registers each week, an applicant shall retain his place on the out-of-work list until he has had at least five (5) days of work, unless he quits or is discharged for intoxication or deliberate misconduct within the five (5) day period. Provided, that an applicant shall lose his place on the out-of-work list and his name shall go to the bottom of the list if he turns down dispatch offers or job offers on three (3) different jobs which he is qualified to perform. No dispatcher or other person is authorized to sign for an applicant.

(g) DISPATCHING HOURS. Dispatching hours are from 8:00 A.M. to 9:30 A.M. An applicant must be present at the Hiring Hall when his name is called in order to be dispatched. Men will be dispatched at other times only in the event of an emergency.

(h) REGISTRATION ON MORE THAN ONE (1) LIST. An applicant may register at more than one (1) Local 38 Hiring Hall, but as soon as he obtains work he shall notify other Local 38 Hiring Halls at which he is registered. If an applicant fails to give such notice, he may be subject to such penalty as may be determined by the Joint Hiring Committee.

(i) EMPLOYER TO NOTIFY DISPATCHER OF THIRTY-TWO (32) HOUR WORK WEEK. In the event any Employer has established a thirty-two (32) hour work week pursuant to the provisions of the Agreement, he shall comply with the provisions established in said Section to notify the dispatcher of the fact that he has established a thirty-two (32) hour week, and shall further notify the dispatcher of the work week to which the individual is assigned at the time of requesting the dispatch, and such shall be indicated on the dispatch form. In the event no such notification is made, the individual will be deemed to be employed on a thirty-five (35) hour week basis.

Section 16.—ORDER OF DISPATCH.

Upon the request of a contractor for men, the Union shall endeavor to furnish the workmen requested. In dispatching workmen from each list, the Union shall first refer to applicants with Group I seniority in the order in which their names appear on the list, and shall follow the same procedure successively with Groups II, III, IV and V. Provided, however, that:

(a) KEY MEN. Requests by contractors for applicants to act as supervisors, foremen, or general foremen shall be honored without regard to the requested man's place on the out-of-work lists; provided requests for applicants to serve as key men from Groups II, III, or IV shall not be honored so long as there are applicants on the Group I list out of work with the requested key man experience. To prevent abuse of this privilege, the qualifications of applicants to serve in any such classification shall be discussed by the contractor with the Business Manager of the Union, or the representative designated by him to act in his absence, before the dispatch is effected.

(b) MEN TERMINATED WITHIN THIRTY (30) DAYS. Written requests by contractors for particular plumbers or pipe fitters from Group I who have been laid off or terminated by the contractor within thirty (30) days prior to the request and were employed by the requesting contractor for a period in excess of one hundred twenty (130) working days during the twelve (12) months preceding the request, shall be honored without regard to the man's place on the out-of-work list, provided the applicant has not obtained employment in excess of five (5) days since the time of termination.

(c) SPECIAL SKILLS. Bona fide requests by contractors for plumbers or fitters with special skills and abilities will be honored. The dispatcher shall dispatch persons possessing such skills and abilities in the order in which their names appear on the out-of-work list.

In determining whether an applicant possesses the particular skills and abilities called for by a contractor, the dispatcher shall consider (a) the applicant's designation of skills and abilities on his Work Card; and (b) the dispatcher's knowledge, if any, of the applicant's skills and abilities, gained either through actual observation or the reports of contractors.

Such a decision of the dispatching agent in referring registrants is appealable to the Joint Hiring Committee as herein provided.

The Joint Hiring Committee is empowered to draft rules and regulations relating to requests by contractors for plumbers and fitters with special skills and abilities, and to modify the provisions of this Section pursuant to issued rules and regulations by requiring additional other proof of the skills and abilities called for to define the type of special skills and abilities which will warrant a special request.

(d) PRIORITY OF CRAFT PREFERENCES. When an Employer calls for a person of a particular craft, e.g., plumber, steam fitter or welder, priority shall be granted to persons who register only under that craft, and to persons who register that craft as their preference, ahead of those who register under more than one (1) craft and list some other craft as their preference.

(e) RIGHT TO HIRE BY NAME. Any Employer requesting men shall have the option of requesting journeymen and apprentices by name provided:

(1) The individual so requested by name is and has been registered on the out-of-work list in Group I for a period of not less than three (3) working days during a non-vacation period;

(2) Neither the Employer nor any representative of the Employer has caused or induced any such member to cease working for any other Employer and to register in the Hiring Hall in order that he could be employed pursuant to the provisions of this Section; and

(3) The employee is eligible for dispatch to the particular Employer and is not excluded from such dispatch pursuant to any other provisions of the Agreement or rules established by the Joint Hiring Committee.

The privilege of calling for an employee by name from among eligible employees in Group I by craft classification may only be exercised in the event an Employer has first obtained an individual from the Hiring Hall on an unnamed basis. Thus, the first employee requested by the Employer must be on an unnamed basis. During the period this first employee is on the payroll, the Employer may employ another individual by name pursuant to the provisions of subparagraph 1 of this Section.

In the event an employee has been called by name, the Employer may not lay off an employee that has been previously employed on an unnamed basis except for just cause. In effecting hiring the Employer shall follow the principle of alternating as above provided so that no less than fifty percent (50%) of the employees covered by the Agreement hired are employees obtained from the Union Hall on an unnamed basis.

In effect lay offs of employees, similarly, the Employer shall lay off in such a manner that the remaining employees shall never be less than fifty percent (50%) hired from the Hiring Hall on an unnamed basis.

No Employer shall be eligible to exercise the privilege of calling an employee by name for the duration of the Agreement if, during the life of this Agreement, the Employer has been found by the Arbitration Committee to have intentionally and deliberately violated any of the wages or benefit provisions of this Agreement or has hired any individual other than through the Union Hiring Hall or is currently delinquent in the payment of fringe benefits. Any Employer who is found by the Arbitration Committee to have solicited employees to work under scale shall also be precluded from requesting employees by name.

No employee shall be eligible to be dispatched pursuant to a name request if:

(1) The employee is not in Group I;

(2) Dispatching the employee will render the Employer in violation of other provisions of the Agreement (ratio of aged individuals to other journeymen; ratio of apprentices to journeymen, etc.); and

(3) The employee has been found, after charge of notice and hearing, to have worked under scale or in violation of Agreement under circumstances leading the Union to conclude that such violation was effected with knowledge that the acts committed were violative of the Collective Bargaining Agreement.

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Section 19.—OUTSIDE CONTRACTORS.

It is recognized that contractors whose principal place of business or customary place of doing work is outside the territory covered by this Agreement, would be at a disadvantage if they were unable to bring with them at least a minimum crew familiar with the Employer's manner of operation. Therefore, it is agreed that such outside contractors may bring into the area temporarily to perform work herein on each job one (1) plumber if the work to be performed is plumbing work, one (1) steam fitter/pipe fitter if the work to be performed requires the skills of a steam fitter or pipe fitter, one (1) lead burner if the work requires the skills of a lead burner and one (1) sprinkler fitter if the work requires the skills of a sprinkler fitter, provided that for each such workman so brought in there shall be one (1) workman obtained through the local hiring halls established herein. Because the privilege of an Employer to bring a workman into the local area is designed to permit the Employer to bring in an individual or individuals familiar with the Employer's manner of operations, the Employer shall not be permitted to bring in an individual who has been employed in an area other than the area where the Employer has his principal place of business and any employee so brought in must previously have been employed by the Employer for at least sixty (60) days in the preceding three (3) years and must have been obtained in accordance with the referral procedures prescribed in the U.A. contract prevailing in the area of their regular employment and location of the Employer's principal place of business to the extent such procedures are legal. All other workmen shall be obtained through the referral procedure described in previous Sections of this Article.

Nothing in this Section shall be interpreted to permit, and it shall be in violation of this Agreement for any contractor having a permanent shop within the territory covered by this Agreement to transfer men into the area from outside the territory without first exhausting the out-of-work list maintained by the local union.

Such a contractor shall not be relieved of his obligation to exhaust the out-of-work list by reasons of his entering into a joint venture of subcontract with an outside contractor.

Any employee brought in or composing the minimum crew provided for in this Section shall be compensated solely and exclusively in accordance with the provisions of this Agreement and payments for the fringe benefits as provided in this Agreement shall be made in accordance with this Agreement.

In the event an Agreement is executed between the trust, established pursuant to this Agreement, and the trust in the area of the outside contractor, to permit refunds on behalf of employees so brought in, such Agreement shall be implemented and the refunds made in accordance with such Agreement but this shall not excuse the contractor to make the contributions provided in this Agreement, and any payment to the local area trust in the outside contractor's regular place of business shall be effected by Agreement of the respective trusts.

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Section 25.—BUMPING SENIORITY.

Unemployed workmen from Group I shall have the right to replace any workmen not dispatched from Group I (other than workmen brought in under Section 19 or hired pursuant to the provisions of Sections 16(a) or 16(c) by dispatch from the Hiring Hall provided he is able to do the work. In effecting such dispatch, the dispatch shall be made from those on an out-of-work list in Group I in the order in which their names appear on the list. The dispatcher shall maintain a list of persons, who to the best of his knowledge, are currently employed and were not dispatched from Group I and are not now qualified for Group I.

Each Tuesday and Friday at 8:30 A.M., the dispatcher in San Francisco and the dispatcher in Harin County shall post the positions that, to his knowledge, are presently being filled by individuals other than from Group I as provided in this Section. Individuals desiring to exercise bumping privileges may do so at that time. In the event two (2) or more individuals of Group I desire to exercise bumping privileges on the same position, the position shall be awarded to the individual with the highest rank in the out-of-work list in Group I in the area in which the work is to be performed. In the event no individual bids on a vacancy in Sonoma County, it shall be posted on the succeeding day in San Francisco at 8:30 A.M. In the event a vacancy occurs subject to dispatch from the San Francisco office and no bid is received in San Francisco, it shall be posted the succeeding day in Santa Rosa. No individual may bid for such position who is not on the out-of- work list in Group I. In the event the position requires special skills, the dispatcher shall, to the best of his knowledge, indicate the special skills so required in posting the list.